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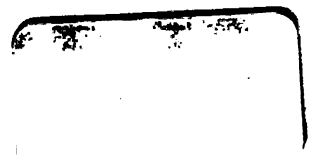

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CASES BROUGHT IN THE COMMERCE COURT

LETTER FROM THE ATTORNEY GENERAL

TRANSMITTING

IN RESPONSE TO SENATE RESOLUTION OF JUNE 10, 1912, INFORMATION RELATIVE TO THE CASES BROUGHT IN THE UNITED STATES COMMERCE COURT

JUNE 12, 1912.—Ordered to lie on the table and to be printed

WASHINGTON
GOVERNMENT PRINTING OFFICE
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10790

DEPARTMENT OF JUSTICE,
OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., June 11, 1912.

To the PRESIDENT OF THE SENATE.

SIR: Pursuant to the request of the Senate contained in resolution adopted June 10, 1912, I have the honor to transmit herewith the following papers:

1. Statement of all cases brought in the United States Commerce Court, together with summary of questions of law and of fact decided in each, with date of commencement of each case and the decision of the court thereon.

2. List of cases pending in the United States Commerce Court on June 11, 1912.

3. List of cases appealed from the United States Commerce Court to the Supreme Court, and the disposition or status of each.

4. Complete set of opinions of the United States Commerce Court.

Very respectfully,

GEO. W. WICKERSHAM,
Attorney General.

STATEMENT OF ALL CASES BROUGHT IN THE UNITED STATES COMMERCE COURT, TOGETHER WITH SUMMARY OF QUESTIONS OF LAW AND OF FACT DECIDED IN EACH, AND DATE OF COMMENCEMENT OF EACH CASE AND THE DECISION OF THE COURT THEREON.—JUNE 11, 1912.

No. 1. *Southern Pacific Company et al.* v. *Interstate Commerce Commission,* commonly known as the "San Francisco switching case."

The Interstate Commerce Commission entered an order requiring the carriers to desist from exacting their switching charge of $2.50 for deliveries on sidetracks at San Francisco where private industries are located, in instances where such deliveries were made by the carrier which hauled the traffic to San Francisco from points outside the State of California. June 1, 1910, the carriers filed a bill in the Circuit Court of the United States for the District of Kansas, supported by affidavits. An answer was filed to the bill. February 8, 1911, the case was transferred to the Commerce Court. April 5, 1911, the United States, after having intervened, filed a motion to dismiss, which was argued and submitted on printed briefs. The Santa Fe Co. claimed that if the order of the commission were enforced, it would sustain a loss of approximately $40,000 a year. The Southern Pacific Co. claimed that if the order of the commission were enforced, it would sustain a loss of approximately $70,705 a year. July 20, 1911, the Commerce Court (Judge Mack dissenting) handed down its opinion holding the order of the commission erroneous because (1) the industrial or spur track service

of railway companies in making deliveries to and from industries located on their lines was a service different from that rendered by them in making deliveries to and from the public team tracks; and (2) the general tariff charge for the transportation of freight to San Francisco did not pay for the delivery of such freight over their rails to the industrial plants and that the carriers were entitled to make additional charges for such deliveries. Thereupon the court entered its order granting the motion for a preliminary injunction and denying the motion of the United States to dismiss the bill. August 18, 1911, an appeal was taken to the Supreme Court from this order and the cause was docketed September 22, 1911.

No. 2. *Atchison, Topeka and Santa Fe Railway Company et al.* v. *Interstate Commerce Commission*, commonly known as the "Los Angeles switching case."

The Interstate Commerce Commission entered its order requiring the carriers to desist from exacting their switching charge of $2.50 for deliveries on sidetracks at Los Angeles where private industries are located, in instances where such deliveries were made by the carrier which hauled the traffic to Los Angeles from points outside of the State of California. June 1, 1910, the carriers filed a bill in the Circuit Court of the United States for the District of Kansas, supported by affidavits. An answer was filed to the bill. February 8, 1911, the case was transferred to the Commerce Court. April 5, 1911, the United States,

after having intervened, filed a motion to dismiss, which was argued and submitted on printed briefs. The Southern Pacific Co. claimed that if the order of the commission were enforced, it would sustain a loss of approximately $84,430 a year. The Santa Fe Co. claimed that if the order of the commission were enforced, it would sustain a loss of approximately $60,000 a year. On July 20, 1911, the Commerce Court (Judge Mack dissenting) handed down its opinion, holding the order of the commission erroneous because (1) the industrial or spur track service of railway companies in making deliveries to and from industries located on their lines was a service different from that rendered by them in making deliveries to and from the public team tracks; and (2) the general tariff charge for the transportation of freight to Los Angeles did not pay for the delivery of such freight over their rails to the industrial plants, and that the carriers were entitled to make additional charges for such deliveries. Thereupon the court entered its order granting the motion for a preliminary injunction and denying the motion of the United States to dismiss the bill. On August 18, 1911, an appeal was taken to the Supreme Court from this order, and the cause was docketed September 22, 1911.

No. 3. *Atlantic Coast Line R. R. Company et al.* v. *Interstate Commerce Commission,* commonly known as the "Kiser boot and shoe case."

The Interstate Commerce Commission reduced the rate on boots and shoes from New England points to

Atlanta, Ga., March 31, 1910; the carriers filed a bill in the United States Circuit Court for the Eastern District of Virginia, seeking to set aside the order of the commission on the ground that the reduced rates were confiscatory, that the commission exceeded its power, and that heavy losses would be sustained. No injunction was issued. February 14, 1911, the case was transferred to the Commerce Court. October 3, 1911, the case was argued and submitted on a motion of the United States to dismiss, a demurrer of the intervener, and an answer of the Interstate Commerce Commission. December 5, 1911, the Commerce Court filed its opinion, sustaining the objections to the bill and gave leave to amend. February 3, 1912, an amended petition was filed, issues were joined, and the evidence was taken. June 4, 1912, on motion of the petitioners, the cause was dismissed, the order of the commission having expired.

No. 4. *Louisville and Nashville Railroad Company* v. *Interstate Commerce Commission.*

April 15, 1910, the Interstate Commerce Commission ordered a reduction in certain class rates from New Orleans to Montgomery and Selma; from New Orleans to Mobile; and from New Orleans to Pensacola. January 26, 1910, a bill was filed in the Circuit Court of the United States for the District of Kentucky, seeking to enjoin and set aside the order alleging that the evidence taken by the commission was insufficient to support the order it had entered. April 9, 1910, the circuit court refused to grant a

preliminary injunction. Issues were joined and the testimony was taken. After the testimony had been taken the case was transferred to the Commerce Court. April 3, 1911, the United States intervened, adopted the answer of the Interstate Commerce Commission, and the case was argued and submitted on printed briefs. It was claimed that if the order of the commission were sustained the loss to the company would approximate $260,000 a year. February 28, 1912, the Commerce Court (Judge Mack dissenting) filed its opinion, holding the order null and void for lack of sufficient evidence before the commission to sustain it. March 7, 1912, final decree was entered annulling the order of the commission and permanently enjoining the same. March 16, 1912, an appeal to the Supreme Court was allowed and the cause has been advanced for hearing in October, 1912.

No. 5. *James J. Hooker et al.* v. *Martin A. Knapp et al.*

No. 6. *The Eagle White Lead Company et al.* v. *Interstate Commerce Commission et al.*

February 17, 1910, the Interstate Commerce Commission ordered a reduction in the rates for the transportation of certain articles mentioned in the southern classification from Cincinnati, Ohio, to Chattanooga, Tenn. The complainants before the commission were dissatisfied with the amount of the reduction and filed a bill in the Circuit Court of the United States for the Southern District of Ohio, seeking to suspend and set aside the order of the commission, and to direct the

commission to reopen and to rehear the case and to order further reductions in the rates, claiming that the commission erred in considering the rates via lines other than the shortest line between the two points. The commission and certain railroad companies filed demurrers to the bill. February 15, 1911, the cases were transferred to the Commerce Court. April 3, 1911, the United States was permitted to intervene and make its defense. May 2, 1911, the United States filed a motion to dismiss the cause for want of jurisdiction, because an unsuccessful complainant before the Interstate Commerce Commission was without right to maintain a suit in court to revise the action and order of the commission. July 20, 1911, the Commerce Court filed its opinion unanimously overruling the motion to dismiss for want of jurisdiction over the cause. The court then entered orders dismissing the bills. It reversed the order and sustained the commission on the merits, Judges Archbald and Mack dissenting.

The complainants appealed to the Supreme Court, and the appeals were advanced for argument and heard on January 8, 1912. On June 7, 1912, the Supreme Court reversed the order of the Commerce Court and directed the dismissal of the bills for want of jurisdiction in the court to entertain the same.

No. 7. *Atchison, Topeka and Santa Fe Railroad Company* v. *Interstate Commerce Commission*, commonly known as the "Lemon rate case."

June 11, 1910, the commission ordered the rate on lemons shipped from southern California to all points

east of the Rocky Mountains reduced from $1.15 per 100 pounds to $1 per 100 pounds. September 7, 1910, the railroad companies filed a bill in the Circuit Court of the United States for the district of Kansas, supported by affidavits, alleging, inter alia, that the order was null and void in that it was made and entered by the commission for the sole purpose of protecting the growers of lemons of southern California against the competition of the growers of lemons of Sicily. October 10, 1910, the commission filed its answers. October 27, 1910, a temporary restraining order was issued. February 16, 1911, the case was transferred to the Commerce Court. April 3, 1911, the United States intervened and on April 6, 1911, filed its answer. The case was then argued and submitted on printed briefs. October 5, 1911, an opinion was filed by the Commerce Court and an order was entered setting aside the order of the Interstate Commerce Commission and permanently enjoining the same without prejudice to the commission, to rehear the case, and to enter another order, which was done. (See No. 61.) No appeal was taken.

No. 9. *The Proctor and Gamble Company* v. *United States.*

December 14, 1910, the Interstate Commerce Commisson sustained the rule and regulation of certain western railroad companies providing for the assessment and collection of demurrage charges on private cars on private tracks of the owners while the same were under lading and dismissed the complaint of the Proctor & Gamble Co. before the commission attack-

ing that rule and regulation. February 22, 1911, the Proctor & Gamble Co. filed a petition in the Commerce Court against the United States to set aside the order of the commission and sought to have the Commerce Court hold that the rule and regulation was void in that it deprived the company of its property without due process of law, was beyond the power of the commission, and to award a large sum as reparation claimed to have been paid by the Proctor & Gamble Co. to the carriers. Eight railroad companies were also made parties respondent to the petition, and the commission intervened. The United States filed a separate motion to dismiss the cause for want of jurisdiction, on the ground that the action of the commission in dismissing the complaint of the Proctor & Gamble Co. directed no affirmative relief of any kind, but was a mere negative order and the Commerce Court was without power to consider or review the same, and the action of the commission was final. The Interstate Commerce Commission filed a motion to dismiss on the merits. The railroad companies answered the petition. April 13, 1911, argument was had on the motions. Subsequently the court tentatively overruled the motions and directed the case to be heard on its merits. The evidence taken before the commission was stipulated into the case and the motions to dismiss renewed, the United States standing on its motion to dismiss for want of jurisdiction. May 11, 1911, the case was argued on its merits and submitted on briefs. July 20, 1911, an opinion was filed and an order entered dis-

missing the petition at the cost of the petitioner. The Commerce Court took full jurisdiction of the cause and after reviewing the action of the Commission held its order was right. On August 10, 1911, the petitioner appealed to the Supreme Court, and the case was advanced for hearing on January 8, 1912. June 7, 1912, the Supreme Court sustained the motion of the United States to dismiss, reversed the order of the Commerce Court in taking jurisdiction over the cause, and remanded the case to the Commerce Court with directions to dismiss the petition.

No. 15. *United States* v. *Union Stock Yard and Transit Company, et al.*

This was an original suit filed by the United States in the Circuit Court for the Northern District of Illinois seeking to have declared the Union Stock Yard & Transit Co., which owned a railroad, and Chicago Junction Railway Co., which operated the said railroad, as common carriers subject to the act to regulate commerce and to compel them as such to file tariffs showing their rates and charges, and to enjoin them from transacting business until they filed such tariffs; and further, to enjoin the Stock Yard Co. from entering into and executing a certain contract by which it sought to pay a certain packing house company $50,000 as a bonus to keep and maintain its slaughtering business in the stock yards. Answers were filed and on March 4, 1911, the case was transferred to the Commerce Court. May 19, 1911, it was argued and submitted on briefs. Mr. Guthrie, chief counsel for the defendants, stated in open court that

the success of the Government in the case would practically disrupt a business of his clients worth approximately $30,000,000. November 14, 1911, the Commerce Court filed its opinion, holding that the Chicago Junction Railway Co., which operated the railroad, was a common carrier by railroad subject to the acts to regulate commerce and ordered it to publish and file tariffs of its rates and charges within sixty days; that the U. S. Y. & T. Co., the owner of the railroad, was not a common carrier, and that the Commerce Court was without jurisdiction to determine whether or not the alleged transaction between the Stock Yard Co. and the packing-house company was in violation of the acts to regulate commerce, and dismissed the petition as to all respondents except the C. J. Ry. Co. March 9, 1912, both sides appealed to the Supreme Court and the cause has been advanced for hearing in October, 1912.

No. 18. *Russe and Burgess et al.* v. *Illinois Central Railroad Company et al.*

No. 19. *J. W. Thompson Lumber Company et al.* v. *Interstate Commerce Commission.*

In these cases the shippers had filed complaints before the Interstate Commerce Commission attacking certain rates on lumber. The commission reduced the rates in accordance with the complaints and denied reparation on previous shipments. September 22, 1909, suits were commenced by the shippers in the United States Circuit Court at Chicago, seeking to set aside that part of the order denying the reparation. The defendants filed demurrers to

the bills. March 4, 1911, the cases were transferred to the United States Commerce Court and the United States filed motions to dismiss for want of jurisdiction as in the Procter and Gamble case (No. 9) and the Hooker (No. 5) and Eagle White Lead (No. 6) cases. These motions were argued April 3, 1911, and submitted on briefs. The motions were tentatively overruled by the court, who directed that the cases be heard on their merits. On October 26, 1911, the cases were argued on their merits and submitted. February 13, 1912, the Commerce Court filed its opinion, assuming jurisdiction of the cause, and holding that the commission erred in not awarding reparation on shipments which moved previous to the filing of the complaint. The cases have remained on the calendar without further action. The motions to dismiss for want of jurisdiction will be renewed, on the authority of the Procter & Gamble case and the Hooker and Eagle White Lead cases.

No. 20. *Chicago, Rock Island and Pacific Railway* v. *Interstate Commerce Commission,* commonly known as the "Greater Des Moines case."

June 25, 1909, the Interstate Commerce Commission entered an order requiring petitioner to put into effect on or before September 1, 1909, certain proportional rates from Rock Island, Ill., to Des Moines, Iowa, applicable on through traffic originating east of the Indiana-Illinois State line. October 14, 1909, the petitioner filed its complaint before the United States Circuit Court, Northern District of Illinois, charging that the rates so reduced were confiscatory

and would reduce its revenues many thousands of dollars annually. No motion for preliminary injunction was made and no hearing was had. November 19, 1909, the Interstate Commerce Commission filed a demurrer. March 4, 1911, the case was transferred to the Commerce Court. April 3, 1911, the United States intervened, and on May 2, 1911, filed a motion to dismiss. No further action was taken until April 18, 1912, when, on motion of the petitioner, the cause was dismissed, the order of the commission having expired.

No. 21. *Goodrich Transit Company* v. *Interstate Commerce Commission.*

No. 22. *Goodrich Transit Company* v. *Interstate Commerce Commission.*

The Interstate Commerce Commission entered orders requiring water-line carriers to report to the commission, on blanks furnished by it, figures of all business conducted by the water-line carriers, both interstate and intrastate. The Goodrich Transit Company filed bills in the Circuit Court of the United States for the Northern District of Illinois attacking that order on the ground that it was void in that it did not distinguish between interstate business and intrastate business and port-to-port business, not over a through route with a joint rate, and alleging that the intrastate business and port-to-port business not over a through route with a joint rate were subjects into which the commission might not inquire. The circuit court granted a stay of the order entered by the commission. March 6, 1911, the cases were

transferred to the Commerce Court. April 4, 1911, the United States, having intervened, filed its answer. The commission filed a motion to dismiss. The latter was argued by counsel for the United States and counsel for the commission and submitted on printed briefs. October 5, 1911, the Commerce Court filed its opinion, holding null and void the orders of the commission and permanently enjoined the same on the ground that the commission had no power or authority to acquire knowledge and information concerning the purely intrastate business or the port-to-port business of water-line companies. November 11, 1911, appeals were taken to the Supreme Court and the causes were advanced and argued in February, 1912. April 1, 1912, the Supreme Court reversed the judgments of the Commerce Court and remanded the cases with directions to dismiss the petitions, holding that when common carriers engage in commerce among the several States, however slight the extent, the commission is entitled to full knowledge and information concerning their entire business, both interstate and intrastate, as well as port-to-port, and that the reports prescribed and the orders made were entirely within its power.

No. 23. *White Star Line, Petitioner,* v. *United States.*
No. 24. *White Star Line, Petitioner,* v. *United States.*

These cases are similar to Nos. 21 and 22, except the petitions alleged that the orders of the commission sought to embrace reports of the private business of water-line companies, such as the conduct

of an amusement park and the sale of confections, etc., therefrom, etc. They were companion cases to Nos. 23 and 24, were heard with them and came to the same result.

No. 25. *Omaha and Council Bluffs Street Railway Company* v. *Interstate Commerce Commission.*

April 27, 1909, the Interstate Commerce Commission ordered the passenger fare of 15 cents between Council Bluffs, Iowa, and Omaha, Nebraska, and from Omaha, Nebraska, to Council Bluffs, Iowa, reduced to 10 cents. February 7, 1910, the company filed a bill in the Circuit Court for the District of Nebraska seeking to enjoin the order of the commission, on the ground that the railway company was an interurban traction company and not a common carrier by railroad within the meaning of the act to regulate commerce and therefore not within the jurisdiction of the commission. March 3, 1910, the commission filed its demurrer and answer. April 25, 1910, the circuit court granted a temporary injunction against the order of the commission, and held that the railway company was not a common carrier by railroad subject to the act to regulate commerce. March 6, 1911, the case was transferred to the Commerce Court. May 2, 1911, the United States intervened and joined in the demurrer and answer of the Interstate Commerce Commission. The case was then heard on bill, demurrer, and answer, and taken under advisement. October 13, 1911, the Commerce Court filed its opinion, holding the common carrier subject

to the law, and on October 13, 1911, entered its order sustaining the demurrer and dismissing the bill. October 23, 1911, the petitioner appealed to the Supreme Court, and the case was argued in January, 1912. No opinion has been filed by the Supreme Court.

No. 31. *Pennsylvania Railroad Company* v. *Interstate Commerce Commission.*

October 4, 1910, a bill was filed in the Circuit Court for the Eastern District of Pennsylvania, attacking an order of the commission, regulating the distribution of coal cars to certain mines within the State of Pennsylvania. To certain parts of the bill the commission demurred and to other parts it answered. March 8, 1911, the cause was transferred to the Commerce Court. April 3, 1911, the United States was permitted to intervene and defend. May 2, 1911, the United States adopted the demurrer and answer of the Interstate Commerce Commission. October 11, 1911, the case was argued and submitted. December 5, 1911, the Commerce Court filed its opinion holding that the questions presented were matters of fact foreclosed by the findings of the commission and dismissed the petition. February 10, 1912, the petitioner appealed to the Supreme Court, where the cause is now pending.

No. 32. *Southern Pacific Company* v. *Interstate Commerce Commission.*

No. 33. *Southern Pacific Company* v. *Interstate Commerce Commission.*

No. 34. *The Atchison, Topeka and Santa Fe Railroad Company* v. *Interstate Commerce Commission.*

In these cases the carriers, on November 15, 1910, filed bills, supported by affidavits, in the Circuit Court of the United States for the Northern District of California, seeking to set aside an order of the commission ordering a reduction in certain transcontinental rates. November 23, 1910, the court denied the application for temporary injunction. January 16, 1911, the commission filed its answer. March 14, 1911, the cases were transferred to the Commerce Court. April 18, 1912, on motion of the petitioners, the cases were dismissed. The Commerce Court took no action in any of the cases other than to dismiss the same.

No. 35. *Denver and Rio Grande Railroad Company* v. *Interstate Commerce Commission.*

The Interstate Commerce Commission reduced the rate on beer from St. Louis, Mo., to Denver and other points in Colorado from 45¢ to 30¢ per hundred pounds. December 24, 1909, a bill was filed in the Circuit Court of the United States for the District of Colorado to set aside the order of the commission. January 24, 1910, the answer of the commission was filed. March 20, 1911, the case was transferred to the Commerce Court, a motion for a preliminary injunction having been denied. November 4, 1911, the evidence was taken. February 12, 1912, the cause was argued and submitted. On April 9, 1912, the Commerce Court filed its opinion and directed a

dismissal of the petition, holding that traffic moving from St. Louis, Mo., to Leadville, Colo., did not lose its interstate character between Pueblo and Leadville, points within the same State, because the freight was billed from St. Louis to Pueblo, and upon arrival there was put into a new train and rebilled from Pueblo to Leadville.

No. 36. *Atchison, Topeka and Santa Fe Railway Company et al.* v. *United States.*

Prior to August 1, 1910, the rate on lumber from certain points in Mississippi and other southern points to Lincoln, Omaha, Council Bluffs, and Des Moines was 26.5 cents. June 2, 1910, the commission reduced the rate to 25 cents. March 30, 1911, the railroad companies filed a petition in the Commerce Court seeking to enjoin and set aside the order of the commission, and moved for a preliminary injunction on the ground that the rate prescribed by the commission was too low and confiscatory. April 11, 1911, the United States filed a motion to dismiss, as did also the commission, and the same were argued with the motion for the temporary injunction and submitted on briefs. May 29, 1911, the Commerce Court entered an order denying the motion for a temporary injunction, and on the same day entered an order overruling the motions to dismiss, with leave to the United States to answer within 20 days. October 18, 1911, the court granted leave to the petitioners to amend their bill. November 29, 1911, an amended petition was filed and

issues were joined. February 6, 1912, the Commercial Club of Omaha intervened. April 9, 1912, on stipulation of the parties the cause was dismissed at the cost of the petitioners.

No. 38. *The Baltimore & Ohio Railroad Company et al.* v. *United States*, commonly known as the "New York lighterage case."

December 5, 1910, the commission entered an order in Federal Sugar Refining Company *v.* Baltimore and Ohio Railroad Company et al., No. 2888, directing seven railroad companies to cease and desist from paying allowances to Arbuckle Bros. on their sugar, delivered to the said railroad companies at their terminals on the Jersey shore by Arbuckle Bros., while at the same time paying no such allowances to the Federal Sugar Refining Co. on its sugar delivered by it to the said railroad companies at their terminals on the Jersey shore, which practice was found to be unduly discriminatory and in violation of the act to regulate commerce. April 13, 1911, the seven railroad companies filed their petition in the Commerce Court seeking to annul and set aside the order of the commission and moved for a preliminary injunction. Notice was given that they would apply for such preliminary injunction on May 17, 1911. Subsequently John Arbuckle and William A. Jamison, as Arbuckle Bros., filed a petition setting forth their interest in the case and served notice that on May 17, 1911, they likewise would apply for a preliminary injunction. The Brooklyn Eastern District Terminal, a corporation, also filed an intervening petition and served

notice that on May 17, 1911, it likewise would apply for a preliminary injunction. The Federal Sugar Refining Company intervened. The United States filed a motion to dismiss, and the commission and the Federal Sugar Refining Co. likewise filed motions to dismiss. The three motions to dismiss were argued together May 17, 1911, and submitted on briefs. May 22, 1911, the Commerce Court entered an order granting the motion for a temporary injunction. On the same day it entered a separate order overruling the motions to dismiss the petition, allowing twenty days within which to file answers. Important questions of both law and fact are involved in the contention that Arbuckle Bros. are receiving preferences and discriminations at the hands of railroad companies as against other independent refiners and shippers of sugar. June 12, 1911, the Interstate Commerce Commission and Federal Sugar Refining Co. took a joint appeal to the Supreme Court. June 16, 1911, the United States followed with a separate appeal. January 9, 1912, the cause was argued in the Supreme Court. June 10, 1912, the Supreme Court announced its opinion, holding the preliminary injunction was issued in the discretion of the Commerce Court and that in view of the importance of the case and the fact that the commission was divided, it would affirm the order of the Commerce Court and, without passing on the merits of the case, it remanded the case with instructions to proceed to a final hearing. June 9, 1911, the United States filed its answer in the Commerce Court, as did also Federal Sugar Refining

Co. The United States is ready to and will at once proceed with the taking of evidence for the final hearing early in the autumn.

No. 39. *Baltimore & Ohio Railroad Company et al.* v. *United States,* commonly known as the "Restricted coal rate case."

February 24, 1911, the Interstate Commerce Commission directed certain railroad companies to cease and desist from giving preferences in rates on interstate shipments of coal for particular consignees, for particular uses, which rates were restricted to certain shippers and were not open to all shippers alike. Numerous railroad companies filed a petition before the Commerce Court, seeking to enjoin and annul the order of the commission and asked for a preliminary injunction. The motion was argued and submitted. May 29, 1911, the Commerce Court granted a preliminary injunction enjoining the order of the commission and issued its writ of injunction. An appeal was taken to the Supreme Court from the interlocutory order or decree of the Commerce Court and an answer was filed by the United States to the petition. Important questions are involved in the contention that railroad companies have been making preferential and discriminatory rates among themselves applicable to coal consumed in the locomotives. January 9, 1912, the case was argued in the Supreme Court. June 7, 1912, the Supreme Court reversed the order of the Commerce Court, holding that railroad companies as shippers and consumers of coal were on the

basis of all other shippers and consumers of coal, that the preliminary injunction was improvident, and directed a dismissal of the petition.

No. 40. *Norfolk & Western Railway Company et al.* v. *United States.*

June 7, 1910, the Interstate Commerce Commission reduced the local class rates from Roanoke, Va., to Winston-Salem, N. C., and from Lynchburg, Va., to Durham, N. C. It also reduced certain other class rates from Cincinnati, Ohio, to the North Carolina destinations. On May 1, 1911, the carriers filed a petition before the Commerce Court, supported by affidavits, seeking to set aside that order, and moved for a preliminary injunction. The motion was argued and submitted. May 25, 1911, the motion for a preliminary injunction was denied. The evidence was taken, and on February 16, 1912, the cause came on for final hearing. The basis of the attack on the order of the commission was that the railroad companies were not given a full hearing before the commission; that their interests were not sufficiently considered; that the rates as reduced were confiscatory; that the commission misapprehended the facts; and that the rates as reduced would conflict with the long-and-short-haul clause; also that heavy losses would result. April 9, 1912, the opinion of the Commerce Court was filed, holding that the various contentions turned purely on questions of fact which were foreclosed by the findings of the commission, and directing a dismissal of the petition. No appeal was taken.

No. 41. *Atchison, Topeka & Santa Fe Railway Company et al.* v. *United States*, commonly known as the "pre-cooling and pre-icing citrus fruits case."

Prior to January 14, 1911, it had been the practice of the railroad companies to permit the shippers of citrus fruits in California to pre-cool and pre-ice the cars prior to shipment, with directions to the carriers not to re-ice in transit. The services of the carriers consisted only of setting the cars preliminarily to pre-cooling and loading and after the cars had been pre-cooled and loaded by the shipper to transport them to destination. For this privilege the carriers have levied a charge of $30 per car. On complaint to the commission, the latter found, January 14, 1911, that the charge of $30 was unreasonable and reduced it to $7.50 per car, which was sufficient to pay for the repairing of the bunkers. May 4, 1911, the carriers filed a bill, supported by affidavits, and moved for a preliminary injunction, on the ground that the commission had acted beyond its power; that the allowance of $7.50 per car did not pay for the cost of the service; that they were not obliged to permit pre-cooling and pre-icing; that their property would be confiscated and that they would sustain enormous losses. After argument, on May 29, 1911, the motion for a preliminary injunction was denied, the court holding that it did not construe the order of the commission as requiring the carriers to continue this privilege, but while the privilege was accorded the charge prescribed by the commission should be sustained. Thereupon the carriers filed new tariffs, to

become effective July 1, 1911, seeking to withdraw their tariffs permitting the pre-cooling and pre-icing. These new tariffs were suspended by the commission, and the case went to a second hearing before that body. April 8, 1912, the commission filed its report and entered its order finding that the shippers had the right to pre-cool and pre-ice their cars and ordered a permanent suspension of the proposed tariffs which sought to take away that right.

May 15, 1912, the carriers filed a supplemental petition, further alleging that the commission was without power to suspend the tariffs and erred as a matter of law in so doing; that pre-cooling and pre-icing constitute a part of the refrigeration and that the carriers were entitled to provide and perform all refrigeration services and make reasonable charges therefor and that $7.50 was not sufficient to pay the cost. A second motion for a preliminary injunction was made before Judge Carland, which, May 17, 1912, was also denied; and the order of the commission is still in full force and effect. From the report of the commission it appears that by this order the shippers of California are saving $600,000 per annum. The case will not come to a final hearing before the autumn.

No. 42. *The Arkansas Fertilizer Company* v. *United States.*

The Interstate Commerce Commission had held, in *Blinn Lumber Co.* v. *Southern Pacific Co.* (18 I. C. C. R., 430), that complaints for reparation should be filed with the commission within two years from

the time the shipment is delivered to the consignee, when the freight charges become due and owing, and not within two years from the time the freight charges are actually paid. The complainant in this case transported certain freight and did not pay the full freight charges. Some months later, after the full freight charges were paid, complaint was filed with the commission alleging that the charges were unreasonable and claiming reparation. The complaint was filed more than two years after the shipment was delivered but less than two years after the freight charges had been paid. The claim for reparation was denied. May 22, 1911, a petition was filed before the Commerce Court setting forth the facts and alleging that the holding of the commission on the legal question was wrong. The commission intervened, admitted the jurisdiction of the Commerce Court, and fully answered the petition, admitting all the facts and reciting in full the circumstances under which the ruling of the commission was made. The United States challenged the jurisdiction of the court on the ground that the action of the commission was not an order within the meaning of the act to regulate commerce creating the Commerce Court. It further contended that the commission rightly held on the law, and that the petition did not state a cause of action. October 5, 1911, the cause was submitted on printed briefs. December 5, 1911, the Commerce Court filed its opinion. Presiding Judge Knapp, with whom Judge Mack concurred, held that the commission rightly

decided on the law, and that the petition should be dismissed. Judge Archbald, concurring, agreed that the petition should be dismissed, not because the petition failed to state a cause of action, but for the reason that the action of the commission did not constitute an order within the meaning of the statute. Judge Carland, with whom Judge Hunt concurred, filed a dissenting opinion, holding that the action of the commission was an order within the meaning of the statute, that the order should be vacated, and the commission directed to hear the case on its merits. An order was entered dismissing the petition and no appeal was taken.

No. 44. *Southern Railway Company et al.* v. *United States.*

June 19, 1911, the Interstate Commerce Commission, in cases before it numbered 2804 and 2838, directed certain common carriers to pay unto the St. Louis Blast Furnace Company the sum of $490.81 and the sum of $7,374.25, respectively, as reparation for unreasonable rates charged and collected for the transportation of coke in carloads from Deepwater, W. Va., to Carondelet, Mo. Other than to order the reparation paid, the commission took no action. August 14, 1911, the railroad companies filed a petition before the Commerce Court seeking to set aside and annul the two orders and to enjoin the same during the pendency of the suit. September 14, 1911, the United States and the Interstate Commerce Commission filed a joint motion to dismiss the petition for want of jurisdiction in the Commerce Court over

the subject matter, the order being one for the payment of money only, and the statute fully and specifically providing for the enforcement of, or the defense to, orders for reparation found by the Interstate Commerce Commission. October 5, 1911, the case was argued and submitted on a brief of the United States. December 5, 1911, the Commerce Court filed its opinion holding that the orders of the commission awarding reparation were subject to review by the Commerce Court under the statute providing jurisdiction in "cases brought to enjoin, set aside, annul, or suspend, in whole or in part, *any order* of the Interstate Commerce Commission," and that the motion to dismiss for want of jurisdiction should be overruled. January 24, 1912, the petitioners voluntarily dismissed the petition on a stipulation.

No. 46. *The Nashville Grain Exchange and Nashville Board of Trade* v. *United States.*

No. 47. *Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway* v. *United States.*

June 9, 1911, the Interstate Commerce Commission entered an order against certain railroad companies directing them to cease and desist from granting to dealers at Nashville the privilege of rebilling or reshipping grain, grain products, and hay from Nashville while denying the privilege to dealers at Atlanta and other Georgia points, holding the practice as it then existed was an undue and unreasonable prejudice and disadvantage in favor of Nashville and

against Atlanta and other Georgia points. August 24, 1911, the complainants in No. 46 filed a petition to annul and set aside the order and for a temporary injunction. The United States and the Interstate Commerce Commission filed a joint motion to dismiss the petition on the ground that the court has no jurisdiction over the parties as original complainants in a separate proceeding. On August 24, 1911, the two railroad companies also filed a bill to annul and set aside the order of the commission and prayed for a temporary injunction. To that petition the United States and the Interstate Commerce Commission filed separate answers. October 18, 1911, the two cases were argued and submitted on printed briefs. October 24, 1911, the Commerce Court announced its opinion and entered its order. It failed to pass on the motion to dismiss in No. 46, but ordered that the two cases be consolidated, and that the petition in No. 46 stand as an intervening petition in No. 47; also that a preliminary injunction issue suspending the order of the Interstate Commerce Commission until the final hearing. The reasons given by the court were that if the preliminary injunction were granted the losses to Atlanta and other Georgia points would be small as compared to the losses which the petitioners would sustain in the event the preliminary injunction was denied and it should develop on final hearing that the petitioners were entitled to the relief prayed; and that the court, under the circumstances, should invoke its "discretion."

Evidence was taken and the cause was finally heard April 11, 1912. June 7, 1912, the Commerce Court filed its opinion (Judge Hunt dissenting) annulling the order of the Interstate Commerce Commission, and holding that because it was claimed that the reshipping privilege was extended to shippers and dealers at Nashville on account of the competition on the Cumberland River, and under the facts as disclosed by the record, the question of discrimination against Atlanta and other Georgia points under section 3 of the act to regulate commerce was one of law on which the commission had erroneously held and that a permanent injunction should issue. An appeal will promptly be taken.

No. 49. *Lehigh Valley Railroad Company* v. *United States*, commonly known as the "Meeker coal rate case."

June 8, 1911, the Interstate Commerce Commission found that the rates for the transportation of anthracite coal in carloads from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., of $1.55 per gross ton on prepared sizes, $1.40 per gross ton on pea coal, and $1.20 per gross ton on buckwheat coal were unreasonable, and ordered the petitioner to apply rates not in excess of $1.40 and $1.30, and $1.15. September 29, 1911, petitioner filed its petition to annul and set aside the order and prayed for a preliminary injunction, alleging in the Commerce Court that the reduced rates were confiscatory of its property. The petition and the exhibits with the affidavits were quite voluminous and set forth the value of the property as $250,000,000 as well as the

various fixed charges and expenditures, and that the loss the company would sustain unless an injunction was issued would approximate $500,000. October 9, 1911, the United States filed a motion to dismiss the petition, and the case was argued on October 9, 10, and 11, and submitted on printed briefs. October 12, 1911, the court entered an order denying the motion for a preliminary injunction. The reduced rates at once went into full force and effect. The cause was continued from time to time until April 11, 1912, when the petitioner withdrew the petition and paid the costs.

No. 50. *Atchison, Topeka & Santa Fe Railway Company and numerous other railroad companies* v. *United States.*

No. 51. *Union Pacific Railroad Company and numerous other railroad companies* v. *United States.*

These are commonly known as the "Intermountain rate cases," and involve the validity of section 4 of the act entitled "An act to regulate commerce," etc., as amended June 18, 1910, as well as the validity of certain orders of the Interstate Commerce Commission in acting upon the applications of certain common carriers for relief under that section. October 4, 1911, petitions were filed charging that section 4 is unconstitutional and void in that it delegates legislative power to the Interstate Commerce Commission, and, if valid, the orders of the Interstate Commerce Commission are beyond its power and confiscatory of the property of the companies in that they seek to fix rates to intermediate points on the basis of a certain percentage higher than the rates to

the Pacific coast terminals. In each case the United States filed a motion to dismiss, and on October 20, 23, 24, and 25 the cases were argued on the motions for preliminary injunctions and the motions to dismiss, and were submitted to the court. November 9, 1911, the court filed an opinion holding null and void the orders of the commission and entered an order granting a preliminary injunction, adjudging that the commission was without power to fix whole bodies of rates on a percentage basis without regard to specific rates on specific articles. November 21, 1911, an appeal was taken from that order to the Supreme Court and the cases were argued and taken under advisement in February, 1912. Subsequently the Supreme Court restored the cases to the docket and assigned them for reargument in October, 1912.

No. 52. *Denver and Rio Grande Railroad Company and numerous other railroad companies* v. *United States*, commonly known as the "Salt Lake rate case."

June 22, 1910, the Interstate Commerce Commission in case No. 2662 entered an order finding that the class rates between Chicago, Mississippi River, and Missouri River rate territory on the one hand and Salt Lake City, Provo, and Ogden, Utah, on the other hand, in both directions, were unjust and unreasonable and that the rates now applied to certain commodities in said rate territories to said points of destination in Utah were unjust and unreasonable, and directed and prescribed certain just and reasonable rates in the place and stead

thereof, and directed the carriers to prepare their tariffs accordingly. October 4, 1911, a petition was filed to annul and suspend the order of the Interstate Commerce Commission, and prayed for a temporary injunction, alleging that the reduced rates were confiscatory of the properties of the companies, and particularly the Denver and Rio Grande Railroad Co., and that the commission acted beyond its power in using the Pacific coast terminal rates as a basis upon which to fix the Salt Lake City rates. On October 26, 1911, the United States filed a motion to dismiss. This case is a companion to cases 50 and 51, and was argued on October 25 and 26, immediately after the submission of those cases. At the conclusion of the arguments the court denied the motion for a preliminary injunction. The hearing of the case has since been continued pending the decision of the Supreme Court in Nos. 50 and 51.

No. 53. *The United States of America, on the relation of Joseph W. Norcross and Roy M. Wolvin, partners doing business as the Flour City Line; and Pillsbury Flour Mills Company, a Minnesota corporation; Northwestern Consolidated Milling Company, a New Jersey corporation; and Russell-Miller Milling Company, a North Dakota corporation, v. Lehigh Valley Railroad Company, a Pennsylvania corporation,* commonly known as "The Flour City Line case."

In this case certain flouring and milling interests in the Northwest organized a corporation for the purpose of conducting a transportation service on the

Great Lakes, independently of any of the larger companies already operating who, it was represented, were allied with the railroad companies. With the water-line companies doing business on the Lakes, the railroad companies, it was alleged, had common arrangements and through routes and joint rates from, say, St. Paul to New York, via rail to Duluth, water to Buffalo, rail to New York. The respondent in the above-entitled cause refused to make such common arrangement and through routes and joint rates with the Flour City Line, and the latter, on October 20, 1911, filed before the Commerce Court a petition for a writ of mandamus seeking to compel the respondent to receive and move the traffic from Buffalo to New York, and to furnish cars and other facilities for that purpose at the same proportion of rates as it received and moved similar traffic for other water transportation companies. October 25, 1911, the court heard brief arguments of the respective counsel, and promptly denied the relief prayed in the petition on the ground that the court was without jurisdiction to entertain the same. The case was then dismissed by the petitioners. The United States was not a party to the suit and took no part in the proceedings.

No. 54. *Anaconda Copper Mining Company et al.* v. *United States of America.*

December 12, 1910, the Interstate Commerce Commission dismissed certain complaints of the mining company and other claimants against Chicago & Erie Railroad Co. and numerous other railroad companies, in which complaints reparation was

claimed on unreasonable rates charged and collected for the transportation of coal from West Virginia and Pennsylvania to South Chicago, Ill. October 23, 1911, the petitioners filed their petition in the Commerce Court, alleging that the orders of the Interstate Commerce Commission in denying the reparation and dismissing the complaints were erroneous in that at the time the complaints were made the defendants had in effect tariff schedules prescribing two separate rates on coke between the points named, one of $2.65, applying on foundry and other furnace coke, and the other of $2.35, applying only on coke for use in blast furnaces for smelting the iron from the ores, and that the basis for the difference in the two rates rested on the uses to be made of the coke.

The United States filed a motion to dismiss for want of jurisdiction, on the ground that an unsuccessful complainant before the commission was without standing to maintain an action before the Commerce Court. The court overruled the motion to dismiss and entered upon a hearing. June 7, 1912, an opinion was filed sustaining the action of the commission on the merits.

No. 55. *Crane Iron Works* v. *United States of America.*

November 11, 1911, the petitioner filed a petition seeking to set aside an order of the Interstate Commerce Commission entered February 8, 1910, dismissing a complaint of the Crane Railroad Co. which sought to compel certain trunk lines to establish through routes and joint rates with the Crane Rail-

road Co. to and from the plant of the Crane Iron Works and the plants of five other industries. The commission dismissed the complaint on the ground that the Crane Railroad Co. was a mere plant facility of the Crane Iron Works and not a common carrier within the meaning of the act to regulate commerce. The United States filed a motion to dismiss for want of jurisdiction on the ground that an unsuccessful complainant before the commission was without standing to maintain an action before the Commerce Court. The court overruled the motion to dismiss and entered upon a hearing. June 7, 1912, an opinion was filed, sustaining the action of the commission on the merits.

No. 56. *The Kansas City Southern Railway Company* v. *United States.*

November 17, 1911, the railway company filed a petition before the Commerce Court seeking to have declared unreasonable certain parts of certain orders entered by the commission prescribing the forms of the reports and accounts to be submitted to the commission by the railway company under section 20 of the act to regulate commerce and requiring the railway company to submit such reports and accounts. It is alleged that the reports and accounts, as prescribed by the commission, do not permit a proper showing on the part of the railway company of its assets, and by reason thereof it will be hindered in the sale of its bonds. Issues have been joined and part of the evidence has been taken. No motion for

injunction has been made and the case may not be finally heard until the autumn.

No. 57. *United States of America, ex rel. Stony Fork Coal Company, Ralston Coal Company, Monarch Coal and Coke Company, and Lignite Coal Mining Company* v. *Louisville and Nashville Railroad Company et al.*

November 25, 1911, the coal companies named filed a petition for a writ of mandamus against the railroad company named and the Southern Railway Co. for the purpose of requiring them to furnish and transport the coals of the mining companies over the line of railroad jointly operated by the two railroad companies at Middlesboro, Ky., and over which the two companies had through routes and joint rates to southeastern territory. From the petition it appears that even though both railroad companies had rated the mines and had access thereto, neither would furnish cars for the transportation of the coal. December 5, 1911, the United States intervened in support of the contention of the shippers. Issues were joined by the two respondents filing separate answers and motions to dismiss. February 15, 1912, the cause was heard. March 4, 1912, the court issued a peremptory writ of mandamus directing them to furnish cars and to transport the coals. March 20, 1912, the court filed its opinion. No appeal was taken and the mandamus has become absolute.

No. 58. *Florida East Coast Railway Company* v. *United States.*

November 6, 1911, the Interstate Commerce Commission, on complaints duly filed before it, upon which issues were joined and hearings were had, reduced the rate on citrous fruits, vegetables, and pineapples from southern Florida to the North. The amount of the reduction in the revenues of the petitioner would approximate $100,000. December 26, 1911, the petition was filed, supported by affidavits, and an application was made to Judge Carland for a preliminary injunction. A hearing was had after notice was served, and Judge Carland stayed the order of the commission. Answers were filed to the petition together with certain counter affidavits. February 9, 1912, the case came before Commerce Court on a motion to dissolve the preliminary injunction. After a hearing that motion was overruled and the injunction continued in force. Evidence was taken before the Commerce Court, and the cause is assigned for final hearing on June 25, 1912.

The basis of the attack on the order of the commission is that the rate prescribed by the commission is unreasonably low and confiscatory of the property of the company. It is further claimed that the commission erred in not considering the full cost of the construction of the "over-sea" extension to Key West, amounting, approximately, to $180,000 per mile for 122 miles. The main defense is that all questions raised are foreclosed by findings of fact.

No. 59. *Southern Pacific Company et al.* v. *United States*, commonly known as the "Willamette Valley lumber rate case."

June 1, 1908, the Interstate Commerce Commission reduced the rate on rough green fir lumber and lath in carload lots from $5 per ton of 2,000 pounds from points upon the east bank of the Willamette River, Oregon, and other points to San Francisco and bay points to $3.40 per ton, and from points on the west bank of said river south of Corvallis to San Francisco and bay points to $3.65 per ton. July 24, 1908, the petitioners filed their bill in the Circuit Court for the Northern District of California to enjoin and vacate said order. February 28, 1910, the circuit court entered its final decree dismissing the bill and the cause was appealed to the Supreme Court. February 20, 1911, the Supreme Court entered its decree, reversing the decree of the circuit court and holding that the order of the commission was not based upon the reasonableness of the rate for the service rendered by the carrier but was based upon an attempted exercise of power by the commission to protect the lumber industry of the Willamette Valley from the effect on their business of the higher rate.

September 13, 1910, complaints were again filed against a proposed advance in the rates to $5 per ton, the tariff having been issued, which was suspended for a hearing on the complaint. February 4, 1911, the commission took further evidence. June 22, 1911, the commission entered its second

order reducing certain of the rates to $3.50 per ton and certain of the rates to $3.75 per ton. January 16, 1912, a petition was filed in the Commerce Court attacking the second order of the commission on the ground that the commission, while it pretended to rehear the case on the issue as to the reasonableness of the rate, in fact it had not done so, but, in an attempt to thwart the opinion and judgment of the Supreme Court, it had merely entered the same order it had previously entered, and in fact based it on identically the same illegal grounds, though it ostensibly had placed it on other and legal grounds. No motion for a preliminary injunction was made. Answers were filed and evidence was introduced. April 17, 1912, the cause was argued and submitted on final hearing. June 7, 1912, the Commerce Court filed its opinion holding that the rate fixed by the commission was not fixed arbitrarily or without considerations which justified it; and above all, not for the purpose of enforcing a policy inaugurated by the carrier, which it was held could not equitably be abandoned; but in the exercises of due judgment, after full consideration of the entire subject, as shown by the reasons given for it. The court directs the dismissal of the petition.

No. 60. *The Baltimore & Ohio Southwestern Railroad Company and the Norfolk & Western Railway Company* v. *United States.*

December 13, 1911, the Interstate Commerce Commission, after a complaint duly filed and a full hearing thereon, entered an order directing the two petition-

ers to construct and maintain for a period of two years from February 15, 1912, switch connections with, and according as their various lines may run, to establish and put in force, for a period of two years from said date, through routes to and from interstate points to and from all points on the line of the Cincinnati & Columbus Traction Company, between and including Boston and Dodsonville, in the State of Ohio, finding that said traction company was a lateral branch line of railroad within the meaning of the act to regulate commerce.

January 22, 1912, a petition was field in the Commerce Court seeking to annul and enjoin that order, and notice of a motion for a preliminary injunction was served. February 6, 1912, the United States filed a motion to dismiss the petition. February 7, 1912, a hearing was had. February 14, 1912, a preliminary injunction was granted. All parties elected to stand on the motion to dismiss. April 9, 1912, the opinion of the Commerce Court was filed, holding that the line of railroad of the Cincinnati & Columbus Traction Company was not a lateral branch line of railroad within the meaning of the statute and that the commission was without power to order the switch connection or to establish the through routes and joint rates. The order of the commission was annulled and a permanent injunction was issued. April 19, 1912, the final decree was entered.

April 23, 1912, the United States and the other respondents appealed. A motion to advance was made and granted and the cause assigned for argument in October, 1912.

No. 61. *Atchison, Topeka & Santa Fe Railway Company and five hundred and thirty-one (531) other railroad and transportation companies and the receivers of certain thereof* v. *United States.*

October 5, 1911, the Commerce Court held null and void the order of the commission reducing the rate on lemons from $1.15 per hundred pounds to $1 per hundred pounds, on the ground that by the order the commission had sought to protect the lemon growers of southern California against the competition of the lemon growers of Sicily.

December 11, 1911, the Interstate Commerce Commission entered a second order reducing the rate on lemons from southern California from $1.15 per hundred pounds to $1 per hundred pounds, expressly basing the order on the question of the reasonableness of the rate for the service rendered. February 2, 1912, a petition for an injunction was filed and notice was served. It was alleged that the order of the commission was made and entered so arbitrarily and unjustly as to fix the rate of $1 on lemons contrary to the evidence and in reality without relevant and sufficient evidence to support it, and that the rate prescribed by the commission was inadequate for the service rendered and confiscatory. February 8, 1912, the hearing was held on the motion for a preliminary injunction. February 10, 1912, an order was entered denying the motion for a preliminary injunction, and the order of the commission became effective. Evidence has been taken, and the cause is now set for final hearing June 24, 1912. The peti-

tioners claim that if the order of the commission remains in force and effect for two years it will result in a loss to them of $450,000.

No. 62. *O'Gara Coal Company et al.* v. *United States.*

February 5, 1912, the Interstate Commerce Commission, after a complaint duly filed and a hearing thereon, filed its report and entered its order dismissing the complaint against the carriers who sought to increase the rate on coal transported from the Harrisburg field in Illinois to Chicago and Milwaukee. It found that the advance did not subject the Harrisburg field, Milwaukee, or the traffic in question to any undue or unreasonable preference or disadvantage.

February 24, 1912, the unsuccessful complainants filed their petition before the Commerce Court seeking to annul the action of the commission and to enjoin the same. February 28, 1912, a motion for a preliminary injunction was heard. March 5, 1912, the motion was denied. No further action has been taken. A motion to dismiss for want of jurisdiction will be made and presented June 24, 1912.

No. 63. *The Cattle Raisers' Association of Texas et al.* v. *United States.*

March 7, 1912, a petition was filed praying that the Commerce Court set aside an order of the Interstate Commerce Commission denying reparation to petitioners on certain numerous shipments of cattle from Texas and other southeastern points. No action has been taken and no order has been entered by the

Commerce Court. As this case is identical in form to the Procter and Gamble case (No. 9) and will be dismissed on motion for want of jurisdiction, no detailed statement seems necessary.

No. 64. *George H. Davis et al.* v. *United States.*

February 5, 1912, the Interstate Commerce Commission filed a report and entered an order prohibiting railroad companies from allowing grain elevators on the Missouri River more than three-fourths of a cent per bushel for the elevation and transfer of grain. March 15, 1912, the petitioners, representing certain boards of trade at cities on the Missouri River, filed their petition in the Commerce Court seeking to annul the order of the commission. Issues were joined. Subsequently the commission, on its own motion, set aside the order and no further action has been taken before the court.

No. 65. *Chamber of Commerce of Augusta, Ga.*, v. *United States.*

April 11, 1912, petition was filed seeking the annulment of the action of the Interstate Commerce Commission in dismissing a complaint alleging that the rate of $2.10 per ton on coal from Coal Creek mines in Tennessee to Augusta, Ga., in force since October 1, 1907, was unjust and unreasonable in itself and subjected the manufacturers of Georgia to undue prejudice as compared with other designated points in the same general territory. In dismissing the complaint the commission denied reparation. June 4, 1912, the case was heard by the Commerce Court

on motions to dismiss. June 7, 1912, the cause was dismissed, the court holding that none of the objections made to the report and order of the commission was tenable.

No. 66. *International Salt Company of Illinois et al.* v. *United States.*

April 26, 1912, a petition was filed in the Commerce Court alleging certain errors and irregularities on the part of the commission in dismissing the complaint of the petitioners against certain railroad companies and denying reparation, while at the same time allowing reparation in another case, the facts of which were alleged to be similar to that of the petitioners. Inasmuch as the petition is filed by complainants who were unsuccessful before the Interstate Commerce Commission, the case falls squarely within the ruling of the Supreme Court in the Procter and Gamble and the Hooker and Eagle White Lead cases, and the Commerce Court is without jurisdiction. June 7, 1912, the case was heard by the Commerce Court on motions to dismiss, and submitted.

No. 67. *Houston, East & West Texas Railway Company et al.* v. *United States.*

No. 68. *The Texas & Pacific Railway Company* v. *United States.*

March 11, 1912, the Interstate Commerce Commission found that the rates from Shreveport, La., to points in eastern Texas are higher than are maintained from Dallas, Houston, and other cities within Texas to such points, under substantially similar circumstances and conditions. The complaint had

attacked the rates from Shreveport as unreasonable and as discriminatory when compared with Texas intrastate rates of the same carriers. The commission found that the class rates out of Shreveport to certain points in Texas were unreasonable, and prescribed reasonable rates for the future, and that the present relation of rates gives an undue preference to the Texas cities in question and effects an unlawful discrimination against Shreveport, and ordered the carriers to cease and desist from charging higher rates upon any commodity from Shreveport to Dallas or Houston, or points intermediate thereto, than are contemporaneously charged by them for the carriage of such commodity to equidistant points from Houston or Dallas toward Shreveport. It was contended by the carriers that the rates between the points within the State of Texas had been fixed by the railroad commission of that State, were unreasonably low, and that the rates so fixed were not a proper basis for the fixing of similar interstate rates. The commission held, however, that if a State, by the exercise of its lawful power, establishes rates which the interstate carrier makes effective upon State traffic, that carrier does so with the full knowledge that the Federal Government requires it to apply such rates under like conditions upon interstate traffic. The commission directed the carriers to put in force and effect the same rates between Shreveport and the Texas points that were in force and effect between the points wholly within the State of Texas.

May 10, 1912, petitions were filed in the Commerce Court seeking to annul and enjoin the orders of the

commission. No motion for a preliminary injunction has been made, and the petitioners have since withdrawn their objections to the class rates prescribed by the commission. The order of the commission becomes effective July 1, 1912, and unless it is further postponed by the commission, a motion for a preliminary injunction will probably be made and acted upon.

No. 69. *Mack Manufacturing Company* v. *United States.*

November 26, 1909, the Interstate Commerce Commission, on the complaint of the manufacturing company and certain other brick companies, reduced the rate for the transportation of fire brick, building brick, and paving brick, in carloads, on shipments eastbound from Central Freight Association territory to trunk-line territory. January 31, 1911, these shippers filed complaints for reparation alleged to be due on shipments which moved prior to the time the commission reduced the rate. The rate had been 22½ cents during the period January 20, 1908, to February 2, 1910, and on the latter date the commission reduced it to 21 cents per 100 pounds from Chicago to New York. The commission declined to award the reparation and dismissed the complaint. May 13, 1912, the complainants before the commission, feeling themselves aggrieved by the action of the commission in refusing to award the reparation, filed their petition in the Commerce Court. June 8, 1912, the Interstate Commerce Commission represented that it had voluntarily set aside its order dismissing the complaint and would rehear the case.

By agreement of the parties the cause in the Commerce Court was dismissed without prejudice.

No. 11. *New York, Ontario and Western Railroad Company* v. *Interstate Commerce Commission.*

No. 12. *Central Railroad Company of New Jersey* v. *Interstate Commerce Commission.*

No. 13. *Delaware, Lackawanna and Western Railway Company* v. *Interstate Commerce Commission.*

No. 14. *New York Central and Hudson River Railroad Company* v. *Interstate Commerce Commission.*

No. 29. *Pennsylvania Railroad Company* v. *Interstate Commerce Commission.*

No. 30. *Lehigh Valley Railroad Company* v. *Interstate Commerce Commission.*

No. 37. *Philadelphia and Reading Railroad Company* v. *Interstate Commerce Commission.*

No. 43. *Boston and Maine Railroad* v. *Interstate Commerce Commission.*

No. 45. *The New York, New Haven and Hartford Railroad Company* v. *Interstate Commerce Commission.*

No. 48. *Erie Railroad Company* v. *Interstate Commerce Commission.*

These cases were all transferred to the Commerce Court from various circuit courts of the Eastern States. March 4, 1907, the commission prescribed the method and form of monthly reports of hours of service of employees of railroads. August 21, 1908, the Baltimore & Ohio Railroad Co. filed a bill in the Circuit Court for the District of Maryland attacking the order of the commission. The commission filed a demurrer,

which the circuit court sustained, and the bill was dismissed. On appeal to the Supreme Court the judgment was affirmed. A stipulation was signed by the counsel to the effect that the foregoing cases would abide by the final judgment in the Baltimore & Ohio case. The Baltimore & Ohio case was decided by the Supreme Court adversely to the complainants. October 2, 1911, the Commerce Court dismissed all the foregoing cases at the cost of the petitioners on stipulations signed by the parties.

No. 8. *Interstate Commerce Commission, petitioner*, v. *Nashville, Chattanooga and St. Louis Railway.*

No. 10. *Delaware, Lackawanna and Western Railway Company* v. *Interstate Commerce Commission.*

No. 16. *Chicago, Milwaukee and St. Paul Railway Company* v. *Interstate Commerce Commission.*

No. 17. *Chicago, Milwaukee and St. Paul Railway Company* v. *Interstate Commerce Commission.*

No. 26. *United States et al.* v. *Long Island Railway Company.*

No. 27. *The New York Central and Hudson River Railroad Company et al.* v. *Interstate Commerce Commission.*

No. 28. *Delaware, Lackawanna and Western Railroad Company* v. *Interstate Commerce Commission and Rahway Valley Railroad Company.*

These cases were transferred to the Commerce Court for the purpose of final disposition and were closed on stipulations and orders of the court thereon. As no action was taken by the Commerce Court other than to enter the orders dismissing the cases, no further statement is given.

LIST OF CASES APPEALED FROM THE UNITED STATES COMMERCE COURT TO THE UNITED STATES SUPREME COURT—JUNE 11, 1912.

No. 719. *Interstate Commerce Commission and United States, appellants,* v. *Baltimore & Ohio Railroad Company* (being No. 39 in the Commerce Court).

February 24, 1911. Order of the Interstate Commerce Commission entered.

April 27, 1911. Petition filed in the Commerce Court.

May 29, 1911. Preliminary injunction issued.

June 6, 1911. Interstate Commerce Commission appealed.

June 16, 1911. United States appealed.

January 9, 1912. Appeals argued in the Supreme Court.

June 7, 1912. The Supreme Court reversed the order of the Commerce Court issuing the preliminary injunction and directed a dismissal of the petition.

No. 722. *United States and Interstate Commerce Commission, appellants,* v. *Baltimore & Ohio Railroad Company et al.* (being No. 38 in the Commerce Court).

December 5, 1910. Order of the commission entered.

April 13, 1911. Petition filed in the Commerce Court.

May 17, 1911. Hearing on motion for preliminary injunction.

May 22, 1911. Preliminary injunction issued.

June 12, 1911. Interstate Commerce Commission and Federal Sugar Refining Company appealed to the Supreme Court.

June 16, 1911. United States appealed.

January 9, 1912. Appeals argued.

June 10, 1912. Order granting preliminary injunction affirmed by the Supreme Court.

(No. 5 and 6, respectively, in the Commerce Court.)

No. 773. *James J. Hooker et. al., appellants*, v. *Martin A. Knapp et al.*

No. 774. *The Eagle White Lead Company et al., appellants*, v. *Interstate Commerce Commission et al.*

February 15, 1911. Cases transferred to Commerce Court.

May 2, 1911. The United States filed a motion to dismiss for want of jurisdiction.

July 20, 1911. The Commerce Court filed its opinion overruling the motion to dismiss for want of jurisdiction and directing the dismissal of the bill on the merits and the petitioners appealed to the Supreme Court.

January 8, 1912. Appeals argued in the Supreme Court.

June 7, 1912. The Supreme Court reversed the order of the Commerce Court dismissing the bills on the merits and directed a dismissal of the bills for want of jurisdiction in the court to entertain the same.

(No. 9 in the Commerce Court.)

No. 780. *The Procter & Gamble Company, appellants,* v. *United States.*

December 14, 1910. Order of the commission dismissing complaint of Procter & Gamble Co.

February 22, 1911. Procter & Gamble Co. filed a petition in the Commerce Court to set aside order of dismissal.

April 13, 1911. Argument was had on the motion of the United States to dismiss the petition for want of jurisdiction, which was overruled

May 11, 1911. The case was argued on its merits and submitted on briefs.

July 20, 1911. An opinion was filed and an order entered dismissing the petition on its merits.

August 10, 1911. The petitioner appealed to the Supreme Court.

January 8, 1912. The appeal was argued.

June 7, 1912. The Supreme Court reversed the order of the Commerce Court and directed a dismissal of the petition for want of jurisdiction.

No. 786. *Interstate Commerce Commission and United States, intervenor, appellants,* v. *Southern Pacific Company et. al.* (commonly known as the "San Francisco switching case," and being No. 1 in the Commerce Court).

July 20, 1911. Commerce Court issued a temporary injunction against the order of the Interstate Commerce Commission.

August 18, 1911. An appeal was taken to the Supreme Court from this order.

September 22, 1911. The cause was docketed in the Supreme Court.

No further action has been taken.

No. 787. *Interstate Commerce Commission and United States, intervenor, appellants,* v. *Atchison, Topeka & Santa Fe Railway Co. et al* (commonly known as the "Los Angeles switching case," and being No. 2 in the Commerce Court).

July 20, 1911. The Commerce Court issued a temporary injunction against the order of the Interstate Commerce Commission.

August 18, 1911. An appeal was taken from that order to the Supreme Court.

September 22, 1911. The appeal was docketed in the Supreme Court.

No further action has been taken.

(No. 25 in the Commerce Court.)

No. 846. *Omaha & Council Bluffs Street Railway Company, appellant,* v. *Interstate Commerce Commission.*

March 6, 1911. Cause transferred to the Commerce Court.

May 2, 1911. Hearing in the Commerce Court.

October 13, 1911. Commerce Court filed its opinion directing a dismissal of the petition and entered its order accordingly.

October 23, 1911. The petitioner appealed to the Supreme Court and the cause was argued January, 1912.

No opinion filed.

(Nos. 21, 22, 23, and 24, respectively, in the Commerce Court.)

No. 879. *Interstate Commerce Commission and The United States, appellants,* v. *Goodrich Transit Company.*

No. 880. *Interstate Commerce Commission and The United States, appellants,* v. *Goodrich Transit Company.*

No. 881. *The United States and Interstate Commerce Commission, appellants,* v. *White Star Line.*

No. 882. *The United States and Interstate Commerce Commission, appellants,* v. *White Star Line.*

March 6, 1911. Cases transferred to the Commerce Court from the Northern District of Illinois.

April 4, 1911. Arguments were made on motions to dismiss.

October 5, 1911. The Commerce Court filed its opinion annulling the orders of the commission.

November 11, 1911. Appellants appealed to the Supreme Court, and the causes were advanced and argued, February, 1912.

April 1, 1912. Supreme Court reversed the judgments of the Commerce Court and directed a dismissal of the petitions.

Nos. 883–928. *United States* v. *Atchison, Topeka & Santa Fe Railway Company and numerous other railroad companies* (being No. 50 in the Commerce Court).

Nos. 884–929. *United States* v. *Union Pacific Railroad Company and numerous other railroad companies* (being No. 51 in the Commerce Court).

June 22, 1911, July 31, 1911. Orders of the commission entered.

October 4, 1911. Petitions filed.

November 9, 1911. Preliminary injunctions issued.

November 21, 1911. Appeals perfected.

February 19, 1912. Appeals argued.

Later restored to the docket for reargument and reassigned for hearing in October, 1912.

(No. 31 in the Commerce Court.)

No. 994. *Pennsylvania Railroad Company, appellant,* v. *Interstate Commerce Commission and The United States.*

March 8, 1911. Cause transferred to the Commerce Court.

April 3, 1911. The United States intervened.

October 11, 1911. The cause was argued and submitted.

December 5, 1911. The Commerce Court filed its opinion dismissing the petition.

February 10, 1912. The petitioner appealed to the Supreme Court.

No further action has been taken.

(No. 60 in the Commerce Court.)

No. 1133. *The United States and Interstate Commerce Commission, appellants,* v. *Baltimore & Ohio Southwestern Railroad Co. et al.*

December 13, 1911. Order of the commission entered.

January 22, 1912. Petition filed in the Commerce Court.

February 6, 1912. United States filed a motion to dismiss.

February 7, 1912. Hearing.

February 14, 1912. Preliminary injunction issued.

April 9, 1912. Opinion of the Commerce Court filed annulling the order of the commission. All parties elected to stand on the motion to dismiss.

April 19, 1912. Final decree entered.

April 23, 1912. Appeal to the Supreme Court.

Cause advanced for hearing October, 1912.

No. 1063. *Interstate Commerce Commission and the United States, intervenor,* appellants, v. *Louisville & Nashville Railroad Company* (being No. 4 in the Commerce Court).

February 28, 1912. The Commerce Court filed its opinion holding the order of the Interstate Commerce Commission null and void for lack of sufficient evidence before the commission to sustain it.

March 7, 1912. The final decree was entered annulling the order of the commission and permanently enjoining the same.

March 16, 1912. The cause was appealed to the Supreme Court.

The Supreme Court has advanced the cause for hearing in October, 1912.

(No. 15 in the Commerce Court.)

No. 1097. *United States* v. *Union Stock Yard & Transit Company.*

March 4, 1911. The case was transferred to the Commerce Court from the Circuit Court for the Northern District of Illinois.

May 19, 1911. The cause was argued and submitted in the Commerce Court.

November 14, 1911. The Commerce Court filed its opinion and entered its opinion. An application for rehearing was allowed and the cause reargued.

March 9, 1912. Final decree entered and both sides appealed to the Supreme Court.

The cause has been advanced for argument in October, 1912.

LIST OF CASES PENDING IN THE UNITED STATES COMMERCE COURT, JUNE 11, 1912.

Nos. 1–2. *Southern Pacific Co. et al. and Atchison, Topeka & Santa Fe Ry. Co. et al.* v. *Interstate Commerce Commission.*

Nos. 18–19. *Russe & Burgess et al.* v. *Interstate Commerce Commission et al.; J. W. Thompson Lumber Co. et al.* v. *Interstate Commerce Commission et al.*

No. 38. *Baltimore & Ohio Railroad Company et al.* v. *United States.*

No. 41. *Atchison, Topeka & Santa Fe Ry. Co. et al.* v. *United States.*

No. 52. *Denver & Rio Grande R. R. Co. et al.* v. *United States.*

No. 56. *Kansas City Southern Ry. Co.* v. *United States.*

No. 58. *Florida East Coast Ry. Co.* v. *United States.*

No. 61. *Atchison, Topeka & Santa Fe Ry. Co. et al.* v. *United States.*

No. 62. *O'Gara Coal Co. et al.* v. *United States et al.*

No. 63. *Cattle Raisers' Ass'n of Texas et al.* v. *United States.*

No. 64. *Board of Trade of Kansas City et al.* v. *United States.*

No. 66. *International Salt Co. of Illinois et al.* v. *United States and Interstate Commerce Commission.*

No. 67. *Houston, East & West Texas Ry. Co. et al.* v. *United States.*

No. 68. *The Texas & Pacific Ry. Co.* v. *United States.*

OPINIONS OF THE UNITED STATES COMMERCE COURT.

ALL OPINIONS HANDED DOWN TO DATE.

JUNE 11, 1912.

United States Commerce Court.

No. 1.—April Session, 1911.

Southern Pacific Company and The Atchison, Topeka & Santa Fe Railway Company, petitioners,

v.

Interstate Commerce Commission, respondent.

United States, Pacific Coast Jobbers and Manufacturers' Association and Associated Jobbers of Los Angeles, intervening respondents.

Mr. Robert Dunlap, Mr. H. A. Scandrett, and *Mr. C. W. Durbrow,* with whom *Mr. T. J. Norton, Mr. F. C. Dillard, Mr. W. R. Kelly, Mr. P. F. Dunne, Mr. Gardiner Lathrop,* and *Mr. W. F. Herrin* were on the brief, for the petitioners.

Mr. J. A. Fowler, Assistant to the Attorney General, and *Mr. Blackburn Esterline,* special assistant to the Attorney General, for the United States.

Mr. P. J. Farrell, for the Interstate Commerce Commission.

Mr. Seth Mann, for the intervening shippers.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[July 20, 1911.]

CARLAND, *Judge:*

The bill in this case was filed for the same purpose as the bill in case No. 2, *Atchison, Topeka & Santa Fe Railway Co., Southern Pacific Co., and San Pedro, Los Angeles & Salt Lake Railroad Co.* v. *Interstate Commerce Commission and United States,* except that the switching service for which a charge is claimed is performed at the city of San Francisco, Cal.

For the reasons stated in the opinion filed in case No. 2, above mentioned, the motion for a temporary injunction made by the petitioners is granted, and the motion to dismiss made by the United States and the Interstate Commerce Commission is denied.

MACK, *Judge,* dissenting.

United States Commerce Court.

No. 2.—April Session, 1911.

The Atchison, Topeka & Santa Fe Railway Company, Southern Pacific Company, and San Pedro, Los Angeles & Salt Lake Railroad Company, petitioners,

v.

Interstate Commerce Commission, respondent.

United States, Pacific Coast Jobbers and Manufacturers' Association, and Associated Jobbers of Los Angeles, intervening respondents.

Mr. Robert Dunlap, Mr. H. A. Scandrett, and *Mr. C. W. Durbrow* with whom *Mr. T. J. Norton, Mr. F. C. Dillard, Mr. W. R. Kelly, Mr. P. F. Dunne, Mr. Gardiner Lathrop* and *Mr. W. F. Herrin* were on the brief, for the petitioners.

Mr. J. A. Fowler, Assistant to the Attorney General, and *Mr. Blackburn Esterline,* special assistant to the Attorney General, for the United States.

Mr. P. J. Farrell, for the Interstate Commerce Commission.

Mr. Seth Mann, for the intervening shippers.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[July 20, 1911.]

CARLAND, *Judge:*

This case has been submitted upon a motion for a temporary injunction made by the petitioners, and upon a motion to dismiss made by the United States and the Interstate Commerce Commission. The motion to dismiss is made by virtue of the provisions of section 1 of the act to create a Commerce Court, which allows such a motion to be made where it is claimed the petition does not set forth a cause of action. As determinative of these motions, our view is necessarily limited to the facts, which are well pleaded in the petition. These facts, as they appear in the petition, are substantially as follows:

The petitioners are railroad corporations, organized under the laws of the States of Kansas, Kentucky, and Utah, respectively. At all times each of said petitioners and their respective predecessors in interest have maintained and do now maintain public freight depot buildings theretofore, respectively, established by them in said city of Los Angeles upon or adjacent to their respective tracks connecting with their respective main tracks in said city where freight in less than carload lots is and has been received for transportation for shippers in said city destined to various points upon their respective lines of railroad or points upon connecting lines of railroad in the United States, and where

such freight transported from various points to Los Angeles is delivered to the owners or consignees thereof.

Each of said petitioners and their respective predecessors in interest have also located and established and have maintained and do now maintain what are known as "team tracks" and freight sheds connected with their respective main tracks in said city of Los Angeles where cars are set for the accommodation of the public in general for the loading therein of carload freight for transportation to various points upon their respective lines of railroad in the United States, and where also is set and placed for the unloading thereof by consignees or owners in said city, who have not been favored with the private or special sidetrack facilities hereinafter mentioned, carload freight consigned and transported from various points on their respective lines of railroad or points on other lines of railroad in the United States or elsewhere to such owners or consignees in said city of Los Angeles; and said team tracks and freight sheds are so connected with the respective main line tracks of the petitioners in said city that cars loaded with carload freight may be readily transferred from said main line tracks to said team tracks and sheds; and where empty cars intended to be loaded with carload freight for transportation may be set and readily transferred when loaded from said places to the tracks upon which trains are made up; and the said team tracks

and freight sheds constitute and have constituted the places where the respective petitioners receive and have heretofore received and have delivered and do now make deliveries of carload freight from and to the public in general in the said city of Los Angeles; and the same are and have been in all respects sufficient and adequate for and fully accommodate those desiring such service.

Said main tracks, team tracks, sheds and buildings above shown constitute the places established as depots or stations by each of the petitioners in said city of Los Angeles for the receipt, handling and delivery of carload and less than carload freight intrastate and interstate. Said facilities so established and maintained for the receipt, handling and delivery of less than carload freight are sufficient for the handling of double the amount of such freight that has been tendered, is tendered, or at any day can be tendered. The freight sheds and team tracks established and maintained for the receipt, handling and delivery of carload freight are sufficient to handle all the carload freight coming into or shipped from said city either for delivery on said team tracks or for delivery on any of the industrial tracks. Said sheds and team tracks so maintained and established are sufficient to handle more than double the number of carloads of freight coming into or going out of Los Angeles, whether originating on or destined to said team tracks or originating at or destined to

the industrial tracks hereinafter referred to; and on said team tracks and at said sheds without inconvenience to them more than double the amount of all carload freight can be received, handled and delivered. In addition to this each of petitioners has in connection with its said depots or stations a considerable amount of vacant land upon which it can and will as the requirements of the public may demand place other sheds and team tracks; so that there is no necessity in the proper conduct of petitioners' business or in the rendering of proper service to shippers in said city to have or maintain the industrial tracks hereinafter referred to. But for the accommodation of certain shippers and for their benefit in loading and unloading, shipping and receiving freight, and to save them the expense of cartage which they otherwise would have to pay, and which is paid by the public not favored with industrial tracks, industrial tracks have been built as hereinafter more fully set forth.

Each of the petitioners, as well as their respective predecessors in interest, have heretofore severally or individually entered into contracts or agreements with certain individual shippers in Los Angeles or with parties who had constructed or were contemplating the construction and operation of plants or industries in said city, for the construction of spur tracks from the respective plant or industry in said city to and connecting with the yard tracks of the respective petitioners in said city where

trains of cars are made up or distributed, a part of the cost of such spur track being generally borne by the railway company and a part by such shipper. But such tracks were constructed especially to accommodate the plant or industry in question and to relieve the owner or operator thereof from the necessity of receiving at or delivering to the team tracks of the respective petitioners carload freight consigned to or shipped by the owner or operator of said plant, and therefrom and thereby the owner or operator of such plant or industry located upon such spur or side track was relieved from the necessity of transferring carload freight to and from said team tracks and from or to such plant or industry by dray or wagon at a higher cost and greater risk; and that the shipper at such industry or plant by reason of such side-track facilities is given or accorded a decided advantage over other shippers in Los Angeles who were not favored with such spur tracks.

In such contracts it was generally stated that at the request of the shipper or owner of the proposed plant the railway company would construct and maintain for a limited number of years, usually less than five, a spur track to connect such plant or industry with the railroad of the railway company. But in such contracts it was generally provided that while the railway company might make use of the proposed track for its incidental purposes such use should not interfere with the movement or use

thereon of cars switched to or from such plant or industry but that the traffic to and from such plant or industry should be given a preferential right in the use of such tracks.

In the contracts made by the Southern Pacific Co. covering the construction and maintenance of such industrial or spur tracks it was generally provided, among other things, as follows:

" 1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Co.), whether such cost may be more or less than amount of foregoing approximate estimate.

" 2. Said track shall be under full control of Southern Pacific Co., and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

" 3. All material in said track furnished at expense of Southern Pacific Co., whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Co., and said Southern Pacific Co. shall keep said track in repair.

" 4. In case said track shall not be used by undersigned for period of one year, said Southern Pacific Co. may, at its option, remove said track.

" 5. All goods shipped from or to said track by rail, routing of which is controlled, or may be rea-

sonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Co., provided rate of charge shall be as low as that from or to point in question by any other rail route."

The contracts made for such purposes by the Atchison, Topeka & Santa Fe Railway Co. contained among other things the following provisions:

" The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the railway company shall have the right to remove said track and every part thereof."

The contracts made by the San Pedro, Los Angeles & Salt Lake Railroad Co. covering the cost and maintenance of such spur or industrial tracks contained provisions similar to those of the Southern Pacific Co. above set forth.

Industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed

under contract, as aforesaid, by the Atchison, Topeka & Santa Fe Railway Co., or its predecessors in interest, in said city of Los Angeles, are distant from its main track in said city anywhere from one-fifth to 1½ miles, and in order to receive a carload of freight from such plant or industry it will be as it has been necessary to switch from the main track or yards of the said petitioner an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over said spur track to the industry or plant in question and to place the same convenient thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

Industries or plants in the said city of Los Angeles located upon the spur tracks heretofore constructed under contract as aforesaid by the Southern Pacific Co., or its predecessor in interest, in said city of Los Angeles are distant from its main track in said city anywhere from 200 feet to 7 miles, and in order to receive a carload of freight from such plant or industry it will be as it has been necessary to switch from the main track or yards of

said petitioner an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over said spur to the industry or plant in question and to place the same conveniently thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

Industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed under contract as aforesaid by the San Pedro, Los Angeles & Salt Lake Railroad Co. in said city are distant from its main track in said city anywhere from one-fifth to 4 miles, and in order to receive a carload of freight from said plant or industry it will be as it has been necessary to switch from the main track or yards of said petitioner an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is and has

been necessary to switch the same from the yards of said petitioner over said spur track to the industry or plant in question and to place the same convenient thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

In such contracts governing the construction and maintenance of such industrial tracks no specific sum was fixed or prescribed in case the railway company should perform the aforesaid special service of receiving or delivering freight at the plant or industry in question, but at the time of executing such contract the usual charge separately and specially set forth in the respective tariffs of petitioners for making such special deliveries or such special receipt of such carload freight, involving the switching service to and from such plant or industry from and to the yards of respective petitioners where trains are made or broken up, had been generally established by each petitioner at the sum or price of $2.50 per car, and had for many years and since the installation of industry tracks in said city been paid by the shippers using such tracks, and at the time of making such special agreements shippers entering into the same understood and willingly consented that if the railway company performed such special service a charge therefor in addition to the freight rate from and to Los Angeles would be made, and such charge of $2.50 per car has generally been made, maintained and collected

from said shippers in Los Angeles for said special service as aforesaid.

The aforesaid service heretofore rendered by the respective railway companies of receiving carload freight at said industries or delivering the same to such industries or plants instead of at the team tracks or sheds is of great value to the owners or operators of such industries or plants and is worth much more than the sum of $2.50 per car inasmuch as a great saving is made by such industries by reason of being relieved of the necessity of paying drayage or other charges which would be involved in the receipt or delivery of carload freight at the team tracks or sheds, and risk of damage to such freight is materially lessened, and shippers who have been thus favored by the construction under special agreement of such spur tracks to and from their industries and by the receipt and delivery of freight thereat are greatly favored and are and have been accorded a decided advantage over other shippers in said city with whom such contracts have not been made or entered into. The general or prevailing charge for drayage in Los Angeles is 50 cents a ton, which makes the cost to the consignee $7.50 on a carload of 15 tons, $10 on a carload of 20 tons, $15 on a carload of 30 tons, $20 on a carload of 40 tons, $25 on a carload of 50 tons, and so on, as against the charge of $2.50 imposed by petitioners for delivering the consignment to or receiving the shipment at the door of the consignee's or shipper's warehouse.

In performing said special switching service involved in the receipt and delivery of carload freight at such industry or plant, petitioners are put to a much greater expense than if such freight was received or delivered on its team tracks or at its freight sheds.

Each of petitioners has made and established its rates of transportation to and from said city of Los Angeles from and to such points on their respective lines, and in many instances joint rates from and to points on many other railroads in the United States; they have duly published and filed with the Interstate Commerce Commission and posted in their respective stations where freight is received their respective schedules or tariffs of rates governing or concerning interstate transportation of freight in which rates are prescribed for less than carload lots and for carload freight; and in respect to less than carload freight the rates have been established and made to cover the receipt or delivery of such freight at the freight station of the respective railway company in said city; and in respect to carload freight the rates established for the public in general contemplate receipt or delivery thereof upon or at the team tracks or sheds of the respective railway company; and in said tariffs it has been and is distinctly and separately provided and stated that where carload freight is received at or delivered to private industries located upon such industry tracks in said city of Los Angeles an additional charge—that is, a

charge in addition to the rate fixed to and from Los Angeles, amounting to $2.50 per car—will be charged and collected for said special service of making delivery or receipt of carload freight to or at said plants or industries located in said city of Los Angeles upon such special industry tracks.

On account of water and other competition the rates of transportation to and from Los Angeles have been forced to an exceedingly low basis so that petitioners do not receive for such transportation sums which they are justly entitled to and which they would otherwise be able to charge and collect.

On or about April 5, 1910, the Interstate Commerce Commission, having investigated the complaint of the Associated Jobbers of Los Angeles against petitioners wherein said charge of $2.50 per car was claimed to be unjust and illegal, made the following order:

"This case being at issue on complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of $2.50 per car exacted by the several defendants for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their re-

spective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:

"It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

"It is further ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul."

Petitioners complain that said order deprives them of all compensation for the said special services so rendered by them respectively, and that said order is by reason thereof illegal and void. The

petition prays that said order be annulled and that the Interstate Commerce Commission be perpetually enjoined from the enforcement thereof.

Whether or not the facts stated in the petition constitute a cause of action depends upon the question whether the petitioners have the lawful right to make the charge of $2.50 per car for the industrial track service mentioned. In the absence of special contract or usage to the contrary, under the common law carriers by land are bound to deliver or tender goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers. This rule, however, never was applied to railroads. They are exempt from the duty of personal delivery, and bound only to carry the goods to the depot or station to which they are destined and there hold or place them in a warehouse ready for delivery whenever the consignee or owner calls for them, after notifying the consignee or owner of their readiness to deliver.

Fenner v. *Buffalo, etc., R. Co.*, 44 N. Y., 505.

Whitbeck v. *Holland*, 45 N. Y., 13.

Chalk v. *Charlotte, etc., R. Co.*, 85 N. C., 423.

South, etc., Alabama R. Co. v. *Wood*, 66 Ala., 167.

New Orleans, etc., R. Co. v. *Tyson*, 46 Miss., 729.

State v. *Republican Valley R. Co.*, 17 Nebr., 617.

Francis v. *Dubuque, etc., R. Co.*, 25 Iowa, 60.

Evershed v. *London, etc., R. Co.*, 2 Q. B. Div., 254.

The order of the Interstate Commerce Commission complained of makes the report of the com-

mission a part thereof and as said order is set out in the petition the report also becomes a part of said petition. It is found in the order of the Commission that the charge of $2.50 per car exacted by the several petitioners for delivering and receiving carload freight to and from industries located upon spurs and side tracks within their respective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul is in violation of the act to regulate commerce. This conclusion is a conclusion of law and of course is open to inquiry in this court. It is not stated in the order itself what particular section of the act to regulate commerce the charge of $2.50 per car for the services rendered by petitioners violates, but as the report of the commission is made a part of the order we are at liberty to examine said report with a view of ascertaining the views of the commission as to what particular provision of the act to regulate commerce the practice or charge of petitioners violates. In this examination we are limited to the report or opinion of the majority of the Commission, the views of the minority not being open to consideration. (*Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.*, 220 U. S., 235.)

In the report of the Commission we find the following language (18 I. C. C. Rep., 310):

"The basic theory of the complainant's case is that these industry spurs are part of the receiving

and delivering systems of the carriers, which theory is met by the defendants with the proposition that these spurs are essentially plant facilities constructed for the convenience of the shipper rather than that of the carrier. In a sense and within proper limitations both of these contentions are sound."

Again, it is said in the report, as follows:

"We are fully convinced that the complainant's view of the nature of these tracks is correct and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers."

It is also stated in said report:

"We do not find in the record sufficient data upon which to base a finding as to the reasonableness of the amount of this charge of $2.50 for interline switching to these industrial tracks, and for the purpose of this present order will assume it to be reasonable."

Again, quoting from the report:

"The service here under consideration, however, is a delivery service and nothing more; the delivery being made at one of the carrier's tracks which is removed at a greater or less distance from its public yards. Spur-track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the

use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle."

The Commission condemned the charge of $2.50 per car made by the petitioners for delivering and receiving interstate carload freight to and from industries located upon spurs or sidetracks within their respective switching limits when such carload freight was moving incidentally to a system-line haul as illegal and unjust. As the Commission did not find the charge of $2.50 to be excessive in and of itself, we conclude that the Commission found that the charge violated section 1 of the act to regulate commerce, the charge being unjust because on the theory of the report of the Commission the carrier had already been paid for this service by payment of the regular tariff from point of origin to destination.

It is claimed by counsel for the United States, under the decisions of the Supreme Court in *Interstate Commerce Commission* v. *Illinois Central R. R. Co.* (215 U. S., 415); *Baltimore & Ohio R. R.*

Co. v. *Pitcairn* (215 U. S., 481); and *Interstate Commerce Commission* v. *Delaware, L. & W. Ry. Co.* (219 U. S., ——), that the findings thus made by the Commission are conclusive upon this court, and that these findings forming a part of the petition, it conclusively appears therefrom that no cause of action has been stated which would warrant this court, taking all the allegations of the petition as true, in granting the relief prayed for. We are not unmindful of the rulings of the Supreme Court in the cases mentioned in regard to the force and effect to be given to the findings of the Commission and have no disposition in any way to avoid the binding force of such rulings. We think that it is fair to say that the conclusion of the Commission that the charge of $2.50 per car for the service named was illegal and unjust was based upon two findings: First, that the industrial track upon which the service was rendered is a terminal facility of the railroad and not a plant facility of the industry to which it leads; and, second, that the service for which the charge is made is the same service as that which is performed by the carrier in delivering freight at its depot or team tracks.

We do not think that whether the industrial track is a plant facility or a terminal facility of the railroad necessarily determines the legality of the charge. The commission in one part of its report found that the contentions of both parties within certain limits were sound. The real question presented is: "Is the carrier lawfully entitled

to charge the sum of $2.50 per car for the service performed upon the industrial tracks?" And we do not think that question can be determined alone by the consideration whether the industrial track is a plant facility or a terminal facility of the railroad, for the reason that it is the service which is performed upon the industrial track that is the question, regardless of the ownership of the track.

So far as the finding of the Commission that the industrial track service is the same as the team track or depot service is concerned, we are constrained to hold that it is not a finding which precludes this court from coming to a different conclusion upon the present record. In cases where there is a substantial conflict in the evidence or testimony upon which a finding of the Commission is based, we would feel bound by the finding unless clearly and palpably against the weight of the testimony; but we do not think that this court is concluded by a finding of the Commission based upon admitted facts which in no wise tend to sustain the conclusion reached. In other words, as in this case, where all the facts are undisputed, we do not think that the Commission can by an ultimate finding based upon the undisputed facts preclude this court from reaching a conclusion of its own upon such undisputed and admitted facts. Where the facts are undisputed there is no occasion for facts to be found, and the ultimate conclusion of the commission is a

mixed question of law and fact which certainly ought not to be held to be conclusive upon this court.

To say that the transportation of cars and freight to and from industrial plants located from one-fifth of a mile to 7 miles from the main track of the carrier is the same service which the carrier performs and for which it is paid by the general tariff charge when it delivers freight at its depot in Los Angeles, or at the team tracks, is so contrary to the admitted physical facts as to be wholly untenable. It seems clear to us that in the absence of statute the carriers in the present case are not bound to perform this industrial track service and if they voluntarily perform it under an arrangement with the owner of the industrial plant we see no reason why they may not charge a reasonable price therefor, and the charge in question is conceded to be reasonable.

We are not at liberty to view the case at this time except as it appears from the petition, and we are wholly unable to come to the conclusion from the facts therein stated, which are to be taken as admitted for the purpose of this motion, that the industrial or spur track service is the same service that the carrier performs by delivery to the team tracks or at the depot, and therefore are unable to say that the general tariff charge on freight shipped to Los Angeles from points of origin would include a delivery at the industrial plant. Nor are we able to see how it can be said that the general tariff charge

includes a delivery at the industrial plant. When it is said that the general tariff charge for the transportation of freight to Los Angeles pays for the delivery of such freight at the industrial plant, upon what authority is this declaration made? Who is to say that it pays for delivery at the industrial plant? The carrier, in the first instance, is entitled to fix its tariff charges for the transportation of freight, and in this instance has fixed a certain tariff for the delivery of freight to Los Angeles. At the same time that it fixed this general tariff it fixed a tariff, which it filed with the Interstate Commerce Commission, for this industrial track service, so that the only party in the first instance that had anything to say about what the general tariff charge should be was the carrier, and it has said that the general tariff charge only carries the freight to the depot or the team tracks. There is no evidence whatever that the carrier ever waived in any way its right to charge for the special service on the industrial tracks. There may be conditions under which the carrier may waive its right to make a charge for terminal service, as was said in *Interstate Commerce Commission* v. *Stickney* (215 U. S., 105):

"The carrier is under no obligation to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and Commission that it is insisting upon it."

The petition in the present case shows that before these tracks were constructed this charge was contained in the general tariffs of petitioners and that said charge for industrial track service was known to the different proprietors and owners of industrial plants and that they consented to such charge. It is admitted of course that such consent or implied contract on the part of the industrial plant owners would be avoided if it was in conflict with any law of Congress regulating interstate commerce. If the carrier is not bound by law to deliver freight at the industrial plant, and it can not be successfully contended that it is, then it follows as a necessary consequence that this industrial track service is a special service and is not a service which the carrier is bound to perform for the general tariff charge for the transportation of freight destined to Los Angeles.

The Commission made no finding that the charge of $2.50 in connection with the transportation of cars to and from industrial plants constituted an undue preference or advantage or was discriminatory in any way, and these questions if they exist at all will not be discussed.

From what has been stated in this opinion as the views of this court, it necessarily results that the motion to dismiss must be denied, and an order will be granted suspending the order of the Interstate Commerce Commission complained of until the further order of this court.

MACK, *Judge,* dissenting:

In my opinion the finding of the Commission, that the industry track service in the city of Los Angeles is substantially the same as the team-track and depot service, is binding upon this court. I agree that this court should not be concluded by a finding of the Commission, based upon admitted facts which in no wise tend to sustain the conclusion reached, but in my judgment the facts in this case, as related by the Commission in its report, fully justify its conclusions. The Commission finds as follows:

"Each of the carriers here involved has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for 6 or 7 miles in a general easterly and westerly direction, and including numerous tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. * * *

"These industry spurs are not private, in that the carrier may use them for purposes of its own—as for storage of cars, as leads to other industries, and sometimes for public delivery. They are often laid upon public streets and over private property, are operated exclusively by the railroad with its own engines, and furnish means of interindustry

conveyance by rail, for which the carrier properly imposes a switching charge. * * *

"We are fully convinced that the complainant's view of the nature of these tracks is correct, and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers. * * *

"Again, it is not to be overlooked that the delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks, or at the sheds, and later switched to oblige the consignee. A train of freight cars goes to the breaking-up yards which lie at the entrance to the city, and there it is divided up with respect to the character of the freight in the various cars and their destination. No one has access to the cars at this point. This yard is purely a railroad facility. After the cars are segregated they are taken to the tracks to which they are ordered—some to the various team tracks distributed along the main line, some to different industries, some perhaps to the railroad shops or to freight sheds or to the stock yards. * * * After a most exhaustive inquiry we can not find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery."

If, then, these industry tracks are, as the Commission in my judgment correctly finds them to be, terminal facilities of the railroad, and if, as the Commission further finds, the service for which the charge in question is made is substantially the same service as that which is performed by the carrier in delivering freight on its team tracks, the Commission was justified in prohibiting, as an unreasonable practice, the additional, so-called switching charge made for the delivery at the industry tracks.

While under the American practice, as distinguished from the English practice, the transportation rate has always included the charge for the use of the ordinary terminal facilities, that is, the use of depots or tracks for the purpose of delivery, it may well be that the Commission has the right, in regulating the practices of the carriers, to require a separation of the transportation rate into its elements. It may well be that the dangers of undue preferences and unjust discriminations in favor of large industries, which can afford to have industry tracks, may not only justify but in the future require the Commission so to act, and that, too, despite the common law principle enunciated in Covington Stock Yards *v.* Keith (139 U. S., 128), and conceded in complainant's brief in the following language:

"Of course, it may rightfully be assumed that the charge established by the carrier for carrying goods to and from the given cities does necessarily embrace the use of instrumentalities which the car-

rier must furnish to accomplish the carriage, such as engines, cars, the railroad and the depots and delivering yards, where goods of the public in general may be received and delivered. In other words, a double charge may not be imposed for the same thing."

If such action should be taken, shippers located on industry tracks, whose cars go directly from the breaking-up yards to these tracks, could not be compelled to pay for the use of the team-track terminal facilities, but, on the other hand, they could be compelled to pay for the use of terminal facilities on the industry tracks. We need not now determine whether, in that event, a higher rate for industry than for team-track delivery could be permitted or compelled if the cost of each delivery, to the carrier, were the same, in order to prevent the large shipper, located on an industry track, from gaining such advantage as would naturally accrue to him from his location.

The Commission, however, has not yet attempted to exercise this possible power. It has acted on the basis of the long-established American practice, which it was justified in assuming would be continued. Under that practice the shippers on industry tracks pay a delivery charge in the regular transportation rate. Nothing in the order sought to be enjoined compels the railroads to continue to maintain the industry tracks or to make delivery thereon. If, however, they voluntarily make delivery thereon, instead of on their other tracks,

they are prohibited from exacting additional compensation for a service found to be substantially the same as that for which payment has already been made.

Moreover, nothing in the order prevents the railroads from making different transportation charges to the various depots or tracks in the city. A difference of 7 miles in the length of the haul might under some circumstances justify a difference in the transportation rate. That rate, however, is not in question on this record. Moreover, this extreme difference in the length of some of the hauls does not, in my judgment, justify the court in holding as untenable the finding of the Commission, based on a careful consideration of all the physical and economic conditions, that industry and team-track delivery in these cities are practically identical.

The conclusion of the Commission is, in substance, that inasmuch as under the American practice no separate charge is made for team-track delivery, but only a single charge for transportation including delivery, a separate charge for the similar, no more costly, and voluntarily substituted spur-track delivery is an unreasonable practice. An order prohibiting the charge is, in my judgment, within the powers granted to it under section 15 of the act to regulate commerce.

United States Commerce Court.

No. 3.—October Session, 1911.

Atlantic Coast Line R. R. Co. et al., petitioners,

v.

Interstate Commerce Commission, respondent, United States, M. C. Kiser Co., and J. K. Orr Shoe Co., interveners.

Mr. Alfred P. Thom, Mr. R. Walton Moore, Mr. Frank W. Gwathmey, and *Mr. John K. Graves* for petitioners.

Mr. James A. Fowler and *Mr. Blackburn Esterline* for United States.

Mr. P. J. Farrell for Interstate Commerce Commission.

Mr. William A. Wimbish for M. C. Kiser Company and J. K. Orr Shoe Company.

On Demurrer to Bill and motion to dismiss.

(For report of Interstate Commerce Commission, see 17 I. C. C. Rep., 430.)

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[December 5, 1911.]

Carland, *Judge:*

March 31, 1910, petitioners filed their bill in the United States Circuit Court for the Eastern District

of Virginia against the Interstate Commerce Commission for the purpose of having an order of said Commission, dated November 27, 1909, and effective April 1, 1910, wherein it was found that the rail and water rate of Central of Georgia Railway Company, Southern Railway Company, Seaboard Air Line Railway Company and the Receivers thereof, Atlantic Coast Line Railroad Company, Ocean Steamship Company, and Merchants and Miners Transportation Company, of $1.05 per 100 pounds for the transportation of less than carload shipments of boots and shoes from Boston and New York to Atlanta, Georgia, to the extent that it exceeded 95 cents per 100 pounds, was unreasonable, unjust, and unduly discriminatory, suspended and annulled. The order also required the said companies to cease and desist, on or before April 1, 1910, and for a period of not less than two years thereafter abstain, from charging, collecting, or receiving the rate so held to be unlawful, and to establish on or before April 1, 1910, and maintain for a period of two years thereafter, a charge for the transportation of less than carload shipments of boots and shoes by water and rail from Boston and New York to Atlanta, Georgia, a rate which should not exceed 95 cents per 100 pounds.

The Commission answered the bill in the United States Circuit Court, and the M. C. Kiser Company and the J. K. Orr Shoe Company, having been allowed to intervene, filed their several demurrers in said court. Subsequently the case was transferred to this court, and the United States, having here been allowed to

intervene, filed its motion to dismiss under the statute. The case is now, after argument, submitted for decision upon the demurrer of the M. C. Kiser Company and J. K. Orr Shoe Company, and the motion of the United States to dismiss. The motion to dismiss so far as it goes covers the same grounds as the demurrer. The demurrer, however, being both general and special, specifies as grounds of demurrer other matters not specifically mentioned in the motion to dismiss. It would seem proper, therefore, to consider the motion to dismiss and the demurrer together.

Speaking in a general way, the bill presents two grounds of attack upon the order of the Commission; first, that the rate of 95 cents per hundred pounds established by the order for the transportation of boots and shoes from Boston and New York to Atlanta is so unreasonably low as to deprive petitioners of a right guaranteed to them by the fifth amendment to the Constitution of the United States in that their property will be taken for a public use without just compensation; and, second, that said order, while in form within the powers of the commission, was such an irregular and unreasonable exercise of authority as to render it void. The demurrer being special and directed to particular paragraphs of the bill, it will be necessary to consider the grounds of the demurrer separately.

It is specified as a ground of demurrer that the Georgia Railroad, the Norfolk and Western Railway Company, Clyde Steamship Company, and Old Dominion Steamship Company were not parties to

the proceeding before the Commission which resulted in the making of the order complained of, and that therefore there is a misjoinder of petitioners. It is alleged, however, in paragraphs 4 and 11 of the bill that the petitioners are and have been for at least ten years participating in the rail and water transportation of boots and shoes from Boston and New York to Atlanta, and the manner in which this traffic moves is pointed out. It is also alleged that the volume of traffic to which the reduction of rates required by the order complained of, if enforced, will by the terms thereof apply, is very large, and will necessarily and inevitably cause corresponding reductions not only by such of the petitioners as are named in said order but by the other petitioners as well, in all such less than carload rail and water rates on boots and shoes from all the other New England and Eastern ports to Atlanta and practically to all other Southeastern points; and that the volume of such traffic to which such reductions will necessarily apply is tremendous in amount, and that the revenues of all of the petitioners will be greatly and seriously impaired if the order is allowed to remain in effect.

From these allegations, admitted by the demurrer, it appears that the petitioners last above named have sufficient interest in the rail and water rate to be made parties to the suit. (*Peavy* v. *Union Pacific Company*, 176 Fed. 409. Affirmed by Supreme Court November 13, 1911.)

Another ground of demurrer is that the Ocean Steamship Company of Savannah and the Merchants and Miners Transportation Company were parties defendant to the complaint and proceedings before the Commission which resulted in the making of the order complained of, and therefore this court can grant no relief without their presence.

It is a sufficient answer to this contention to say that this case is not an appeal or writ of error where all parties against whom the decree or judgment is rendered must join in the appeal or writ, or in lieu thereof a summons or severance must be had, but it is a plenary suit in equity, and certainly any party against whom an order establishing rates is made may petition this court for redress without joining other parties to the order, the injury, if any, being several, and not joint. (*Peavy* v. *Union Pacific Company*, supra.)

Paragraph 10 of the bill is demurred to upon the ground that the petitioners therein named, to wit, the Georgia Railroad, Norfolk and Western Railway Company, Clyde Steamship Company, and Old Dominion Steamship Company, were not necessary parties to the complaint before the Commission; and if they, as carriers participating in the traffic affected, have any just cause of complaint such complaint may and should be presented to the Commission, which is authorized by law to grant rehearings and to modify its orders. While we think it is entirely proper for parties against whom an order

has been made to apply to that body for a rehearing, we know of no rule that makes it a condition precedent to the bringing of a suit in this court for the purpose of setting aside the order. (*Peavy* v. *Union Pacific Company* supra.)

Paragraph 11 of the bill is demurred to upon the ground that it fails to state the volume of the traffic affected, the revenues derived therefrom, and to what extent these revenues will be affected by the enforcement of the order complained of, and upon the further ground that the bill fails to state what reductions in other rates will necessarily and inevitably follow the enforcement of the order, by what carriers, and between what points such reductions would be made, and the extent of such reductions. The only purpose of paragraph 11 is to show that the carriers which are complainants in this proceeding and which were not parties before the Commission have such an interest in the controversy as entitles them to be made complainants, and we think the paragraph is sufficiently specific for that purpose.

Paragraph 13 of the bill is demurred to upon the ground that no facts are stated to support the conclusion that in establishing the rates and charges condemned in the order complained of the complainants were not making or giving any undue or unreasonable preference or advantage to any shipper, locality, or description of traffic, or subjecting any special locality or description of traffic to any undue or unreasonable prejudice or disadvantage.

As the commission condemned the rates which were complained of only because they were unreasonably high, the allegations in paragraph 13 would seem to be irrelevant, and for this reason we do not stop to consider whether it is sufficiently specific or not, but will sustain the demurrer thereto.

Paragraph 16 is demurred to upon the ground that a mere conclusion of law is pleaded and no facts are alleged showing wherein the enforcement of the order in question will deprive the complainants or either of them of any right guaranteed by the Constitution of the United States. An inspection of said paragraph shows that it is mere argument and therefore is bad on demurrer.

Paragraph 18 is demurred to upon the ground that it is hypothetical, and upon the *further* ground that in order to support the general conclusion therein pleaded the bill should show the amount of revenue necessary and sufficient for the maintenance of complainants as common carriers in the discharge of their duties to the public, and to what extent such revenue would be affected by the readjustment of rates upon a basis as low as that prescribed by the order complained of. We think the demurrer is well taken, as there is nothing to show the extent to which the carrier would be compelled to construct and apply its other rates upon the basis of the rates named in the order complained of.

Paragraphs 20 and 21 are demurred to upon the ground that no facts are alleged in support of the gen-

eral conclusion therein pleaded. An examination of said paragraphs has convinced us that the demurrer as to these paragraphs should be overruled.

Paragraph 22 of the bill is demurred to upon the ground that the facts therein alleged do not support the allegation that the order complained of is based upon an erroneous theory. We think the paragraph is sufficient as against the demurrer. We do not now, however, decide whether it is material or not.

Paragraph 23 is demurred to upon the ground that the facts therein pleaded are immaterial to any issue in the case. An inspection of said paragraph convinces us that the demurrer is well taken.

Paragraphs 24, 25, and 26 are demurred to upon the ground that the facts therein alleged do not support the conclusions reached. As paragraph 24 is clearly irrelevant and immaterial, the demurrer thereto will be sustained. It is held in *Interstate Commerce Commission* v. *Chicago, Rock Island and Pacific Railway* (218 U. S., 85), that railroads can complain of rates which affect their revenue but not as to how they affect shippers and places. The demurrer to paragraphs 25 and 26 is overruled for the reason that, assuming said allegations to be material, they sufficiently set forth facts with reference to the matters therein pleaded.

Assuming but not deciding that a violation of the fifth amendment to the Constitution of the United States may be based upon an order which establishes a rate on a single article or commodity, we proceed to examine the allegations of the bill upon

which it is sought by the pleader to found such a violation. If a case of confiscation is charged at all in the bill, it is contained in paragraphs 12, 14, 15, 17, and 19, which paragraphs are as follows:

12. Complainants allege that their rates and charges filed with said commission and now in effect applying to the transportation by rail and water of boots and shoes in less than carload quantities from Boston and New York to Atlanta are just and reasonable charges for the service rendered within the meaning of the act to regulate commerce.

14. They show that said rates and charges are not more than reasonably compensatory—that is to say, that the revenue therefrom is not more than sufficient to pay the actual cost of the service rendered in the transportation of said traffic and a reasonable profit.

15. Complainants show that none of their rates or charges, as aforesaid, are unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of said act, within the meaning of section 15 of said act.

17. Complainants show that the rates sought to be established by said order are not just and reasonable rates or charges for the transportation of the property aforesaid, but, on the contrary, are unjust and unreasonably low rates or charges; and complainants allege that the establishment of such rates is in excess of the power and authority of the said defendant commission under the said act to regulate commerce, more particularly section 15 thereof, and that said order is in violation of said act and in contravention of the Constitution of the United States, more particularly the fifth amendment thereof, the

benefit and protection of which said act and said amendment the complainants specially claim.

19. Complainants show that the rates ordered to be established are less than reasonably compensatory, affording them revenue not sufficient to pay the actual cost of service rendered in the transportation of said traffic and a reasonable profit, thereby violating said act and said amendment to the Constitution of the United States, the benefit and protection of which said act and said amendment the complainants specially claim.

Paragraph 12, above quoted, is demurred to upon the ground that the bill states no facts upon which to found a general allegation that the rates in effect prior to the making of the order complained of were just and reasonable charges for the service rendered and that said paragraph states a mere conclusion without supporting it with allegations of issuable facts.

Paragraph 14 is demurred to upon the ground that the complainants fail to allege the actual cost of the service rendered in the transportation of the traffic affected, or to show the revenue actually derived from such traffic, and also fails to show the amount of the profit derived by the complainants, respectively, from such traffic, or what constitutes a reasonable profit for the service performed.

Paragraph 15 is demurred to upon the ground that no facts are stated upon which to found the conclusion pleaded that none of the rates or charges upon the traffic affected are unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial.

Paragraph 17 is demurred to upon the ground that no facts are pleaded tending to show that the commission in making the order complained of exceeded its power and authority.

Paragraph 19 is demurred to upon the ground that the bill fails to show the cost of the service rendered and the revenue derived therefrom, together with the profit earned thereon, and hence fails to show beyond a doubt that the enforcement of the order complained of will necessarily amount to the taking of petitioners' property without compensation and without due process of law.

We think the demurrer in some of its specifications as to the paragraphs mentioned must be sustained. In determining this question we must remember that the petitioners are asking this court to enjoin and suspend an order of the Commission fixing rates for the future, in the making of which the commission exercises a legislative function. The importance of the judgment we are asked to render in the matter must not be overlooked. Before we may annul the order we must be clearly satisfied it is our duty to do so. In view of the character of the order and the importance of our action in reference thereto, we believe that this court is entitled to, and must require of the petitioners a full and fair statement of all the facts upon which they rely for relief. It is only in rare instances that conclusions of fact or law may be rightly pleaded. The court ought to be permitted so far as possible to draw its own conclusions from the facts

stated by the pleader. In the present case we think the pleader should inform the court as to what is meant by the words "reasonably compensatory." What may be "reasonably compensatory" in the opinion of the pleader may not be so in the opinion of the court. Likewise, we think the court should be informed as to what the pleader means by the words "reasonable profit." Perhaps if the pleader should state what he would regard as a "reasonable profit" the bill would be bad on its face. Again, it is alleged that the revenue derived from the transportation of boots and shoes from Boston and New York to Atlanta under the old rate was not more than sufficient to pay the actual cost of the service rendered and a reasonable profit. We think we are entitled to some showing as to what the revenue derived from the traffic is, and, if possible, the cost of service. If the cost of transporting a single commodity can not be shown, and it seems to be conceded that it is rarely possible to do so, then such other facts in lieu thereof as may make out a violation of the fifth amendment to the Constitution should be stated. We do not say that in cases where cost of service can not be shown a violation of the fifth amendment may not be made out in other ways, but when petitioners undertake to plead the items of revenue, cost of service, and profit, we are entitled to more information concerning them than is contained in the bill in this case. Whatever information exists bearing upon the contentions of petitioners is largely in their possession, and in cases of this kind no material information should be

withheld, consistent with the rules of good pleading. We are sustained in these views by the decisions in *L. & N. R'y. Co.* v. *Siler* (186 Fed., 190), and *Southern Pacific Co.* v. *Campbell* (189 Fed., 182).

We now come to consider the second general ground of attack upon the order of the commission, namely, the exercise of power in such an unreasonable manner as to render the order void.

Paragraph 27 is demurred to upon the ground that none of the facts therein alleged tend to support the conclusions pleaded. Said paragraph alleges that the Commission took into consideration in making its order certain factors which it is alleged could have no influence with the commission in reaching a proper decision. While we do not wish to be understood as now deciding that the facts set forth in paragraph 27 would render the order complained of void, they are of such persuasive force if true as to cause us at this time to overrule the demurrer as to this paragraph.

Paragraphs 28 and 29 are mere arguments, and as to them the demurrer is sustained.

Paragraphs 30, 31, 32, and 33 are demurred to upon the ground that the Commission being an expert tribunal, appointed by law and informed by experience, is not limited in its consideration of questions presented to the evidence formally offered and introduced by the parties, but in the exercise of its administrative function it may and should have recourse to all sources of pertinent information and should apply its expert knowledge and accumulated

experience to the determination of the question whether particular rates are or are not just and reasonable.

The paragraphs last above mentioned are as follows:

30. Complainants show that the said defendant commission exceeded the authority delegated to it by the said act and erred as a matter of law in the following particular also: They allege that no evidence was introduced before said defendant commission tending to show that a rate of 95 cents per hundred pounds from Boston and New York to Atlanta for the carriage of the traffic involved in the proceeding before said commission was, is, or would be a fair, just, reasonable or nondiscriminatory rate, or a rate fairly compensatory for the service rendered; and complainants show that the ascertainment of such rate was based not upon any competent evidence nor upon any evidence, but was the result of mere conjecture, and that said order, based on conjecture, as aforesaid, is in excess of the authority of said commission and will, if enforced, violate the rights of said complainants under the said act to regulate commerce.

31. Complainants allege that the said finding and said order of said commission is unauthorized and erroneous in the following respect: In that it appears from the report of the commission which accompanied the said order that the commission in arriving at its conclusion misapprehended the evidence which was introduced in the said proceeding. The commission was apparently controlled by its belief that complainants and other carriers had voluntarily established and applied for a long period a rate of 85 cents on boots and shoes in less than carloads, whereas

complainants aver that said rate of 85 cents was never voluntarily established; that independent of the action of a court which compelled its application, it was never in force except for a few days, and that its enforcement for a long period was required by a judicial decree which restrained the complainants from charging any higher rate.

32. The complainants further show unto your honors that the rates now in effect are just and reasonable rates in themselves. They show that at the hearing before the defendant no evidence was offered, heard, or introduced tending to show that said rates were unreasonable, unjust, or unlawful in and of themselves; that there was no such evidence of the cost of the actual service for which such rates were charged, the value of such service, or as to the various elements which are properly to be considered in determining whether or not a given rate is reasonable in and of itself. Your complainants therefore show that the said order is not based upon evidence tending to show the unreasonableness of the rates in effect, and that in such respects the order is unjust, unreasonable, unlawful, in excess of the authority of said defendant under said act to regulate commerce, and in violation of the Constitution of the United States, more particularly the fifth amendment thereto.

33. Complainants show that said order is not based on any finding or conclusion of said defendant that said rates are unjust or unreasonable in themselves for the service involved in said transaction, and complainants show that in this respect said order exceeded the authority of said defendant and is in violation of said amendment to the Constitution of the United States.

It will be observed that the allegations of the bill are to the effect that there was no evidence offered, heard, or introduced tending to show the existing rates to be unjust, unreasonable, or unlawful in and of themselves, or that a rate of 95 cents per hundred pounds from Boston and New York to Atlanta for the carriage of the traffic involved would be a fair, just, and reasonable rate. If the contention raised by the demurrer goes so far as to say that the Commission may rely wholly upon their expert knowledge and accumulated experience to condemn an existing rate and establish a new rate for the future in its place, we must hold that the demurrer should be overruled. The Commission, in the investigation of any question, may bring to its solution the accumulated experience and expert knowledge of its members, and it would be its duty to do so, but before an existing rate may be condemned there must be a finding of some sort that it is unjust and unreasonable (*Interstate Commerce Commission* v. *Stickney*, 215 U. S., 105), and this finding must be based upon evidence of which the carrier is apprised so that it may meet the case brought against it if it so desires. Further, if it shall be claimed in support of the demurrer that the Commission may condemn an existing rate whenever it is of opinion that it is unjust and unreasonable, and that this opinion may be based merely upon the expert knowledge and accumulated experience of its members, then, indeed, is a carrier not only deprived of the equal protection of the law but of the protection of

all law. Certainly the carrier is entitled to some proceeding which may in truth be called due process of law before its property rights may be invaded. The importance of the question raised requires an examination of the statute under which the Commission acts when it decides to establish a rate for the future. Section 15 of the act to regulate commerce, as it stood when the order in this case was made, provided as follows:

"* * * That the commission is authorized and empowered and it shall be its duty whenever after full hearing upon a complaint made as provided in section 13 of this act * * * it shall be of the opinion that any rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property as defined in the first section of this act * * * are unjust or unreasonable, or unduly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged."

By the plain language of the law the power of the Commission to prescribe a rate for the future can not be exercised unless after full hearing on complaint made it shall be of the opinion that any of the rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of the act, for the transportation of persons or property as defined in the first

section of the act, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of the provisions of the act. The word "opinion" must be interpreted with reference to the connection in which it is used in the law. It is only after full hearing upon complaint made that the law gives any weight or significance to the opinion of the commission; that is, it is only when the opinion results from the full hearing that it can be used as the basis of further action by the commission. It is true that in making up the opinion of the commission its members may and it is their duty to call to their aid their knowledge and experience, but if Congress had intended that the commission could make up its opinion from the knowledge and experience of its members independent of any evidence in the particular case, then it was idle to provide for a full hearing, as an opinion of the commission could be formed as well without as with the full hearing. A full hearing not only means an opportunity to be heard by the carrier, but an investigation by the commission itself of the lawfulness of the rate in question.

It is distinctly alleged in the language above quoted from the bill, which is admitted by the demurrer, that at the hearing which resulted in the making of the order complained of in this case no evidence was offered, heard, or introduced tending to show that the existing rates were unreasonable or unjust, but that said order was the result of mere conjecture and speculation. The allegation that there was no such

evidence offered, heard, or introduced is an allegation of fact so far as the question of pleading is concerned, but whether or not there is at the close of a final trial any evidence to sustain a finding of fact made by a judicial or quasi judicial tribunal is always a question of law, which in a case like the one at bar, this court has jurisdiction to determine. (*Ward* v. *Joslin*, 186 U. S., 142, 147; *United States Fidelity & G. Co.* v. *Board of Comm'rs*, 145 Fed., 144, 151, 76 C. C. A., 114, 121; *Laing* v. *Rigney*, 160 U. S., 531, 540; *Southern Pacific Co.* v. *Pool*, 160 U. S., 438, 440; *The Francis Wright*, 105 U. S., 381, 387; *Clement* v. *Ins. Co.*, 7 Blatchf., 51, 53, 54, 58, Fed. Cases No. 2, 882; *Fisher* v. *Scharadin*, 186 Pa., 565–569; *Delaware, L. & W. R. Co.* v. *Converse*, 139 U. S., 469, 472; *Howe et al.* v. *Parker et al.*, C. C. A. Eighth Circuit, opinion filed October 12, 1911.)

The demurrer therefore, so far as it is general, will be overruled. So far as it is special it will be overruled as to paragraphs numbered 10, 11, 20, 21, 22, 25, 26, 27, 30, 31, 32, and 33, and sustained as to paragraphs numbered 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 28, and 29.

It results that the motion to dismiss will also be denied.

Leave to amend petition within 30 days is granted. The United States is granted permission to answer the original petition within 10 days, and to plead to the amended petition if one is filed within 10 days from the date of the service of a copy thereof.

United States Commerce Court.

No. 4.—April Session, 1911.

Louisville & Nashville Railroad

v.

Interstate Commerce Commission, respondent.

United States, intervening respondent.

On final hearing on bill, answer, and proofs.

For opinion of Interstate Commerce Commission see 17 Inter. Com. Com. Rep., 231.

For opinion of Circuit Court, refusing preliminary injunction, see 184 Fed., 118.

Mr. Helm Bruce and *Mr. W. G. Dearing* for petitioners.

Mr. W. E. Lamb for Interstate Commerce Commission.

Mr. J. A. Fowler, Assistant to the Attorney General, and *Mr. Blackburn Esterline*, special assistant to the Attorney General, for the United States.

Mr. Alfred P. Thom and *Mr. Walker D. Hines* for Southern Railway.

Mr. Edward Barton for Baltimore & Ohio Southwestern Railroad.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[Feb. 28, 1912.]

ARCHBALD, *Judge:*

A brief history of this case will aid in understanding the questions to be decided. For a number of years prior to 1907 the through rates on certain classes of freight over the Louisville & Nashville Railroad, the present petitioner, from New Orleans, La., to Montgomery, Selma, and Prattville, Ala., were higher than the rates on the same classes from New Orleans to Mobile, an intermediate point, plus the rates from Mobile to Montgomery and the other places mentioned. The through rates from New Orleans to these places were also similarly higher than the rates to Pensacola plus the rates from there to the same destinations, the two situations in this respect being identical.

This somewhat peculiar condition was brought about, as it is alleged, by the fact that the rates from New Orleans to Mobile and Pensacola were made lower than might justly have been charged, as well as lower than the general basis of rates prevailing in that section of the country, because of the necessity for meeting water competition between these places; from which policy it resulted, as is to be gathered from the record, that the rail line of the petitioner greatly increased its tonnage, and eventually secured the bulk of the traffic, the rail rates being continued for a number of years after the water competition had practically been eliminated.

Following, however, the enactment of the Hepburn law in 1906, the Interstate Commerce Commission, in an administrative ruling, which has several times been re-affirmed, announced that through rates in excess of the combination of intermediate rates would be regarded as prima facie unreasonable, and that the burden would be on the carrier to defend them. Subsequently to this, and possibly prompted by it, in June, 1907, the Montgomery freight bureau, on behalf of the commercial interests of that city, filed with the Commission a formal complaint against the railroad, alleging that the higher through rates to Montgomery than the combination on Mobile, on certain classes and commodities, subjected Montgomery to undue prejudice and disadvantage, in favor of Mobile, in violation of section 3 of the interstate commerce act. Influenced by this, no doubt, and by the ruling of the Commission referred to, the railroad, on August 13, 1907, advanced its rates from New Orleans to Mobile and Pensacola on certain classes of freight, by varying amounts sufficient in each case to make the new combination on Mobile and Pensacola correspond with the through rate to Montgomery. This action of the railroad, coupled with subsequent reductions on a number of articles, by taking them out of their respective classes and giving them special commodity rates, apparently had the effect of satisfying the commercial interests of Montgomery, and nothing further seems to have been done in consequence upon the complaint filed by the freight bureau of that city.

This did not, however, satisfy all parties. For a number of years the rates out of New Orleans had been the subject of agitation by the New Orleans Board of Trade, and at various dates, in October and November, 1907, complaints were accordingly filed with the Commission by that body, severally charging that the rates to Mobile and Pensacola as recently advanced by the railroad, and the through rates to Montgomery and the points grouped with or based thereon, were unjust and unreasonable in themselves as well as in comparison with the rates from Memphis, St. Louis, and Louisville. A restoration of the rates in effect to Mobile and Pensacola prior to August 13, 1907, was thereupon prayed, and a reduction of the rates to Montgomery, so that they would not exceed a combination of the locals by way of these places as thus established. The adjustment of certain commodity rates relatively to St. Louis and Memphis was also asked for.

The railroad duly answered these complaints, denying that the rates in force were unjust or unreasonable, and setting forth in detail the facts and circumstances relied on to justify them. But after answering and before any hearing by the Commission had been entered upon, the railroad voluntarily established special commodity rates on a number of articles which had been complained of, thereby making the rates on all articles, or at least on most articles, from New Orleans to Montgomery points, as well as to Mobile and Pensacola, the same as or lower than the rates from Memphis and the other places named

to these destinations. This was the undoubted intention of petitioner and appears to have been generally if not completely carried into effect.

The three New Orleans cases were heard by the Commission together and were disposed of November 26, 1909, in a single report and order. This order, in substance, condemned the advance in rates to Mobile and Pensacola on the classes involved as unjust and unreasonable; directed the restoration of the rates in force prior to August 13, 1907, to these places; declared the through rates to Montgomery, Selma, and Prattville, to the extent that they exceeded the sum of the locals by way of Mobile and Pensacola prior to that date, to be also unjust and unreasonable; and prescribed for the future certain maximum rates to be maintained by the railroad for the statutory two-year period. The rates which were so prescribed to Mobile and Pensacola were the same in each case as the rates which had existed prior to the advance made by the company, and the rates to Montgomery were exactly equal to the rates to Pensacola and Mobile as so restored, plus the rates from these places to Montgomery, which remained unchanged; the rates to Selma being made up in the same way, and those to Prattville having the prevailing arbitrary added.

This order, by its terms, was to go into effect February 1, 1910, but was postponed by supplemental orders until April 15, following; prior to which time a bill in equity was filed by the railroad against the Commission in the Circuit Court of the

United States for the Western District of Kentucky, and an application made for a preliminary injunction. This application was heard by three circuit judges on bill and affidavits, and was denied by the court in an opinion by Judge Severens (184 Fed., 118); after which the order of the Commission became effective and has since been complied with.

The Commission having answered the bill, an examiner was appointed and a large amount of testimony taken on behalf of the petitioner, the entire proceedings before the Commission, including the testimony submitted to it, being also under objection made a part of the record. No proof was offered in opposition to this in support of the order, the Commission taking the position that having been made after a full hearing, upon due consideration of the issues involved and in the exercise of the authority conferred by the statute, the order was not open to question. Upon the organization of the Commerce Court the case was transferred here, and now comes up for disposition upon final hearing. It has been ably and elaborately argued in all its different phases, but there is only one that it seems necessary to pass upon, and that is, whether the Commission, in the order which it has made, has not in a legal sense acted as charged in such an unreasonable manner that its order is invalid, having nothing of substance or persuasive force upon which it can rightly be predicated. This is claimed to result because the reasons assigned in the report either do not justify the conclusion reached or are so at vari-

ance with the undisputed facts that effect has plainly not been given by the Commission to the evidence which was produced before it; and therefore, as it is put in the petition—repeated frequently in various connections—the "order is unreasonable, unjust, unlawful, arbitrary, and oppressive and in excess of the authority granted and powers conferred upon" the Commission by the amended act to regulate commerce. Stated in another form the question is whether this order, tested by the principles recently emphasized by the Supreme Court in *Interstate Com. Com.* v. *Union Pacific R. R.*, decided January 9, 1912, should not be set aside because there was no substantial evidence to sustain it. That is to say, whether the Commission, while in form acting within the authority conferred by the statute, has not in effect disregarded it. And it is to this question that we therefore address ourselves.

In this connection we take occasion to say that if the conditions dealt with in the report of the Commission were substantially as they are there described, we should have little hesitation in dismissing the petition. For even though in that case it might seem doubtful to us whether the Commission had reached a just conclusion, it would nevertheless appear that there was room for differences of opinion, because different inferences were able to be drawn, and in such case the conclusions of the Commission should be accepted as to matters thus clearly within its jurisdiction. But the question here is whether the report can fairly be regarded as of that character. On the

taking of testimony in the circuit court after the preliminary injunction had been refused, the entire evidence before the Commission was introduced into the record, and it is to that evidence that reference is made in this opinion unless otherwise stated. That evidence we have read and re-read with the utmost care, and it is because of our inability to understand how, on the facts which there appear, the report before us could have been made, that the difficulty under which we labor arises.

By the express provisions of the statute (sec. 15) before going on to prescribe future rates the Commission must reach the conclusion that the existing rates established by the carrier are unjust and unreasonable. It is the duty and the privilege of the carrier in the first instance to fix the rates to be charged (*Inter. Com. Com.* v. *Chicago Great Western Railroad*, 209 U. S., 108, 119), and it is only where after due notice and a full hearing—whether on complaint of a shipper or upon investigation by the Commission of its own motion—it is made to appear that the rate is unjust and unreasonable, that the Commission is empowered to fix another. The hearing which is so provided for is not a perfunctory one. The carrier is entitled to know and to rely on what is adduced at it, either for or against the existing rate, and the Commission is not authorized to disregard it and reach a conclusion not at all justified by it. If the rate attacked is shown to be unjust, it may be abrogated and a new one established. But if that is not the outcome

of the hearing and on the contrary it is clearly shown that the rate is not unjust, the evidence as to this can not be put aside, and if it is, and the Commission without reference to it proceeds to condemn the rate and to fix another, its action is invalid.

After the most careful consideration we are forced to conclude that the action of the Commission in the present instance is of that character. Having regard to the evidence, the only tangible ground upon which it will be found to rest is the fact that there had been an advance in the rates to Pensacola and Mobile, and that the Montgomery rate exceeded the sum of the rates through these points as they stood prior to this increase, making the increase in these intermediate rates the only proof of unreasonableness, not only as to Pensacola and Mobile, but Montgomery also. It is conceded by counsel for the Government that if this were true as to the rates to Montgomery, the order of the Commission would be invalid, because it would not be based on the reasonableness or unreasonableness of these rates independently considered. And it is just as clear that if the reduction to Mobile and Pensacola was a mere restoration of the rates previously in force, based solely on the advance made by the railroad, it is equally indefensible. And, taking the case as it stands, there is practically nothing else, as it seems to us, that can be made out of it. Not but that other reasons are given by the Commission. But it will be found upon examination, as stated above, either that they are entirely unsupported by

the evidence or are involved in such capital mistakes with respect to it, or are in themselves so inconsequential as to the reasonableness or unreasonableness of these rates, that nothing can be consistently predicated upon them. And this we will now endeavor to demonstrate.

The New Orleans-Montgomery rate, which has been set aside by the order of the Commission, was one of very long standing and was established with great circumspection. In 1886 Hon. Thomas M. Cooley, whose attainments are too well known to dilate upon, the first chairman of the Interstate Commerce Commission, was called upon by the railroads running into what was designated as the southeastern territory to arbitrate and adjust the relative rates from crossing points on the Ohio and Mississippi Rivers to certain places such as Montgomery and others within the section of country roughly described as lying between the Memphis & Charleston Railroad on the north, the Gulf of Mexico on the south, the Chattahoochee River on the east, and the Mobile & Ohio Railroad on the west. He was not to determine specific rates, but their relation to each other. This question had first been submitted to Mr. James R. Ogden, as commissioner of certain associated railroads running into this territory, and after he had passed upon it it was submitted to Judge Cooley, who virtually affirmed Mr. Ogden's rulings. So far as the present comparison is concerned it is sufficient to note that it was thereby decided that the rates from Louisville, Evansville, Cairo, and other like points on the

Ohio River, to Birmingham, Montgomery, Selma, and other points within the defined territory should be the same; that the rates from East Cairo, Columbus, Hickman, and points on the Mississippi in Kentucky should be two cents less; and that the rates from Memphis, Vicksburg, and New Orleans should be four cents less. An adjustment of rates was made by the railroads in accordance with this, including those from New Orleans to Montgomery and other points in that section, and these rates were maintained, at least so far as class rates are concerned, until the building of the Kansas City, Memphis & Birmingham Railroad from Memphis to Birmingham, which made a very much shorter line than had previously existed between these cities, when the rates on the first six classes of freight from Memphis to Birmingham were greatly reduced below what they had been, and those from New Orleans to Birmingham were also reduced to correspond relatively, in accordance with Judge Cooley's adjustment. The reduction from New Orleans to Birmingham, however, proved too great and could not be maintained, and the rates between these places were at first restored to the original figures, and then reduced to an intermediate position; and this brought about a reduction on rates for these classes between New Orleans and Montgomery, Montgomery being intermediate to Birmingham. The final adjustment of these rates was reached in 1896, and as fixed at that time they remained substantially unchanged until 1910, a period of 14 years, when the Commission made the order in question.

The original careful determination of the New Orleans-Montgomery rates, in their relation to those from Ohio and Mississippi River points into the same territory, in accordance with the Cooley arbitration; the subsequent readjustment of them upon the building of the Memphis and Birmingham short line; and their long continued acceptance by the business public, during which time freight moved freely under them; all strengthen the presumption in favor of the reasonableness of these rates; against which there is practically nothing to militate except the previous competitive water rates from New Orleans to Mobile and Pensacola, and the combination to be made on them to Montgomery. The conclusion is thus forced and indeed is patent on the face of things that the Montgomery through rates as now fixed by the Commission are nothing more than the restored competitive Mobile and Pensacola rates plus the previous rates from those places to Montgomery.

There is no change, as it will be noted, in the rates from Mobile and Pensacola to Montgomery. The change in the Montgomery through rate is effected by reducing the rates from New Orleans to the intermediate points named and combining them with the rates from there to Montgomery, the reduction in the New Orleans-Montgomery through rates being exactly the same as the reduction made in the rates to Pensacola and Mobile as to every class except one—class E—where the through rate is reduced 1 cent, as against a 5 cent reduction to Mobile, and none at all to Pensacola. This coincidence is

too significant to be a mere accident, or to fail to reveal the consideration which influenced it. It extends to the through rates to Selma and Prattville, as well as to Montgomery, not only by way of Mobile but of Pensacola also, an exactitude which it is impossible to account for except upon the ground which has been suggested. Not only is the reasonableness or unreasonableness of the through rates to Montgomery, as fixed by the Commission, thus made to depend on the reasonableness or unreasonableness of the Mobile-Pensacola part of them, but they are all obliged to stand or fall on the fact of this coincidence, by which, as conceded by counsel, they are not able to be defended. It is true, as already stated, that there are other reasons assigned by the Commission in its report for the reduction in the New Orleans-Montgomery rates, but, with due respect to the Commission, they do not bear up under examination.

The relation of rates established by the Cooley arbitration and the disturbance inevitably to result from a disregard of it was pressed upon the Commission as strong grounds against the proposed changes. "The Cooley arbitration of 1886," it is said in the report, "has been strongly urged * * * as a reason for the non-reduction of the present advanced rates. This arbitration established a relation of rates as between the several Ohio and Mississippi River crossings, applying upon products from the territory north and west of those rivers destined to southern and southeastern territory, by fixing a basis for making rates from these several basing points to

the southeastern territory, with the object of maintaining an equitable relation and equality of the basing rate as between said points on goods transported to southeastern territory, but we do not understand that this arbitration undertook to fix the actual rates for carriage from the several basing points to destinations in this territory. However, if such were the case, the building of new railroads, competition, and other causes forced many departures from the adjustment and the rates made under it, until it has become materially altered, and it is inevitable and proper that it should yield to meet new and changed conditions."

From this, which is all the Commission has to say on the subject, it would be supposed that the Cooley award was only a basis of adjustment accepted many years before, but which had come to have little more than historical value. In other words, that it was merely a starting point from which departures were frequently and freely made. If this were so, the Commission might properly regard it as of no great importance and certainly as furnishing no substantial obstacle to further modification by the reduction of rates from New Orleans. But the record before the Commission, as we read it, does not warrant the inference apparently intended from the statement above quoted. Taken by itself the statement is not literally inaccurate, since it seems that some changes were made at various times in the rates on particular articles by taking them out of their respective classes and giving them special commodity rates, and to such

extent as changes of this character were made they may be regarded in a sense as departures from the Cooley arbitration basis. Moreover, the fact that the complaint of the New Orleans Board of Trade embraced in terms commodity rates as well as class rates, and that there was more or less testimony at the hearing which must have related to commodity rates, doubtless accounts for what the Commission says upon this subject. But when it is remembered that no change of consequence in class-rate relations had taken place since the original adjustment, except the one heretofore explained, and that the order in question pertains only to class rates from New Orleans the matter presents itself in a very different aspect. Surely the long continuance of these class rates, which are the basis of the rate structure in that territory, and which must be assumed to have been equitably adjusted as between the various competing towns on the Ohio and Mississippi Rivers by the Cooley award, was a valid and persuasive objection to any order which would have a disturbing effect upon the class-rate situation. Nor was the force of this objection appreciably lessened by the circumstance that some articles were taken out of the classes from time to time and given commodity rates. Particularly is this so in view of the fact that the Commission's report contains no intimation that class rates from other points should be reduced, clearly indicating that the order in question was not predicated upon any finding or contention that this class-rate adjustment was unfair to New Orleans. When

therefore the facts in this regard are fully perceived their important bearing upon the controversy seems evident, and they are not to be dismissed from consideration, as they appear to be by the Commission, on the mistaken view that "the building of railroads, competition, and other causes had forced departures from the adjustment of rates under it until it had become materially altered, as was inevitable and proper to meet changed conditions;" as suggested.

As a further reason for making the order in question the report of the Commission contains the following: "It was stated by the principal witness for the defendant that between points on its line where the through rate exceeded the combination of rates from point of origin to a competitive point and from said competitive point to destination, shippers were given the benefit of the combination rate, and this provision appeared in special circulars and was very generally observed as a rule for the adjustment of freight rates; and such having been formerly the custom of the defendant, it would seem now to work no especial hardship upon it to reduce rates to the basis of the former combination."

The reference here is to the testimony of Mr. C. B. Compton, the traffic manager of the Louisville & Nashville Railroad, who has been with that road in continuous service in various capacities for some 40 years. But a careful reading of his testimony discloses no basis for the statement quoted, if it was meant thereby to imply that the Mobile combination was at any time allowed on through shipments to

Montgomery. On the contrary, it clearly appeared that such shipments had always paid the Montgomery rate, and that the Mobile combination could be secured only by shipping first to Mobile and then reshipping to Montgomery, as seems to have been done in a few instances. Indeed, this is recognized as the fact by the Commission, since it is stated in an earlier part of the report that "prior to August 13, 1907, shippers, in order to get the benefit of the lower combination, sometimes shipped locally to Mobile and then reshipped to Montgomery, Selma, and Prattville." Of course, if the fact had been otherwise, and the road had ordinarily or frequently carried Montgomery traffic on the Mobile combination, the commission might well say that it would be no great hardship to require the carrier to publish in its tariff the actual rates which it habitually accepted; but the undisputed evidence shows that the full Montgomery rate was constantly applied to Montgomery shipments, and we fail to see how that circumstance tended to show that the Montgomery rate was unreasonable.

It is undoubtedly true, as testified by Mr. Compton, that it was a more or less general practice to protect through shipments against the combination of locals, and a rule to that effect was carried by his road in certain of its local tariffs; but there was no such rule in the tariffs naming rates to Montgomery territory, and nothing whatever appeared at the hearing to indicate that through traffic to Montgomery was ever carried at less than the Montgomery rate. A colloquy

occurred in the course of Mr. Compton's examination in which he seems to have admitted that the rule in the local tariffs referred to, not being limited in terms, might be claimed to have authorized the application of the Mobile combination to Montgomery shipments. But the point is not what those tariffs might have been construed to mean, but what the actual practice was in respect of the traffic in question. Evidently the road was always careful to maintain this Montgomery rate. Everything indicates that it consistently did so. And it seems plain to us that the acceptance on other parts of the system of combination rates which were lower than through rates had no tendency to show that these particular rates were unreasonable. In short, when the undisputed facts regarding this feature of the case, as they appeared before the Commission, are taken into account, they not only do not sustain the conclusion of the Commission, but seem to be rather of contrary import.

With respect to the through rates from New Orleans to Montgomery, as well as the southeast territory generally, it is further said by the Commission, in justification of its action, that: "It was shown that the merchants of New Orleans have heretofore made ineffectual efforts to secure better rates to this territory, as higher rates were in effect from New Orleans to this territory than existed from distributing centers at greater distances west and north of said territory, the situation being such that New Orleans was cut off from the trade of this section as to many products, and greatly restricted and

burdened as to many others, on account of the high rates of transportation."

Tested by the complaints of the New Orleans Board of Trade, which, as above shown, embraced in general terms commodity rates as well as class rates, this statement can not be said to be wholly incorrect. Prior to the adjustments already referred to, and which were voluntarily made by the carrier, months before the order in question was issued, it was perhaps true that New Orleans merchants were at some disadvantage because the class rates from New Orleans on certain articles may have been higher than or out of line with the commodity rates from other points on those articles. But this cause of complaint, to whatever extent justified when the proceedings before the Commission were instituted, was substantially if not wholly removed before the hearing was concluded by the reductions and adjustments hereinbefore mentioned, which resulted in actual rates from New Orleans lower on most articles and not higher on any article than rates from Memphis and other points west and north of Montgomery. And this was apparently recognized by the Commission to be the case, since it made no order respecting commodity rates. But when the paragraph quoted is tested by the class rates, which are the only ones reduced by the Commission's order, it is not only not supported by the testimony, but the contrary is shown by proof that is not open to question. Instead of being discriminated against by the class rates to Montgomery

territory, New Orleans has had an actual advantage over the Ohio and upper Mississippi River towns, an advantage over Memphis in the higher classes and at least equality with it in the other classes, and an equality with Huntington, Vicksburg, and the lower Mississippi points to Memphis; all of which is established by comparative tables which stand unchallenged and by the tariffs, as we are advised, then on file with the Commission. So far, therefore, from sustaining the action of the Commission, the undisputed facts in this regard tend unmistakably to a contrary conclusion.

But the Commission also mentions that the rates from New Orleans to Montgomery, Selma, and Prattville were higher on all the classes than those from typical points in the Southeast, where the distances were greater, such as Brunswick and Savannah, Ga., Charleston, S. C., Wilmington, N. C., and Nashville, Tenn.; to say nothing of Virginia and North Carolina points, which are referred to in another connection. But in this comparison the Commission for its initial points goes over into an entirely different territory. It leaves the Mississippi and Ohio Rivers and goes to the Atlantic coast, in the Carolinas and Georgia, without any suggestion that traffic conditions from there to Montgomery and Selma are at all similar to those from New Orleans, which is the subject of comparison, the only basis of contrast being one of distance. The railroad company in its bill makes complaint of this and avers that the conditions

are so dissimilar as to render the comparison unjustified, and that no issue as to the reasonableness or unreasonableness of the rates so applied as a standard was made, nor any evidence introduced which was addressed to that inquiry. And this the Commission in its answer admits, conceding that there was no *fixed* relation between the rates from these points and those from New Orleans; which we understand to mean no definite or determining relation.

So also with regard to the rates "from New Orleans to certain stations just outside of Montgomery on the Mobile & Ohio Railroad," which are said by the Commission to be less than the rates to Montgomery by the Louisville & Nashville. The bill avers that these were unimportant local points, which did not enter into competition with Montgomery; that the traffic to them was insignificant; that no testimony was taken concerning them; and that the Louisville & Nashville Railroad does not publish or participate in or have anything to do with them. And the Commission, answering this, admits that the reasonableness of the rates to these local points was not in issue, and that no attempt was made to determine whether or not they were reasonable, and that it did not undertake to determine the reasonableness of the rates prescribed in the order complained of on the basis of the rates referred to. But if all this be so, it is difficult to see why there was any reference made to them at all, or why they were put forward by the Commission, in the way they were, to justify the

order, if they had no influence upon it. The effect of the answer therefore is to eliminate this part of the report, aside from the other considerations which also do so.

Equally immaterial is the statement that the rates from Virginia cities to Montgomery and Selma are less than from New Orleans, although covering twice the distance; or that those from north Atlantic ports to points in the southeastern territory basing on Montgomery are more favorable, length of haul and number of lines considered; which are some of the minor things entering into the decision. And especially is this to be said of the water rates from New York and Boston to Mobile and New Orleans, which have no perceptible bearing on the rail rates between the latter two places in the connection in which they are cited.

By contrast with this, it might be inquired why the Commission in making comparisons took no note of the rates established by the railroad commissions of Alabama and Georgia, which show that, for 141 miles, the distance between New Orleans and Mobile, the accepted-as-controlling factor in the situation, the rates by the Louisville & Nashville Railroad, which have been condemned and reduced by the Commission as unjust and unreasonable, were materially less than the maximum or so-called standard tariff established by the Georgia commission, and much lower still than the rates which were permitted to the Southern Railway in

Alabama, Georgia, Tennessee, and South Carolina; as will appear by the comparative table which is reproduced below, as taken from the evidence.

	Class—						
	1	2	3	4	5	6	E.
Louisville & Nashville rates from New Orleans to Mobile, 141 miles	50	39	38	31	27	16	20
Southern Railway rates fixed by commissions of Alabama and Georgia for 141 miles	75	63	56	44	35	29	35
Minimum or standard tariff of Georgia Railroad Commission, 141 miles	60	50	45	35	28	23	28
Southern Railway rates in Tennessee, 141 miles	58	50	46	37	31	27	32
Southern Railway rates in South Carolina, 141 miles	62	52	42	39	31	24½	31
Southern Railway rates, Chattanooga to Birmingham, 143 miles	57	49	41	32	27	19	27
Southern Railway rates Birmingham, Ala., to Columbus, Ga., 157 miles	57	49	45	35	28	22	27
Southern Railway rates, Chattanooga to Atlanta, Ga., 138 miles	52	45	41	32	25	20	27

Let us not be misunderstood upon this point. We recognize, of course, that comparisons are very commonly made in the investigation of rate cases, and that they may often be quite persuasive. The competency of such evidence is not questioned nor the right of the Commission to give it due weight. Neither is it doubted that the Commission may receive evidence of this kind, giving to the facts so shown their proper value, without proof of similarity of conditions. But what we do hold is that the comparisons made by the Commission in its report in this case, taking into account all the facts and circumstances disclosed at the hearing, had no evidentiary bearing upon the reasonableness of the rates

in dispute, and therefore furnish no appreciable support of the Commission's conclusion.

As a further justification for the reduction of the rates to Montgomery the Commission suggests that the rate per ton per mile, on an average of the first six classes of freight, is much greater from New Orleans than from Memphis, St. Louis, or Louisville. It is not said, as will be noted, that the rates to Montgomery are higher than from Memphis and the other places mentioned, but that, considering the distance, the rate per ton per mile is greater. But it is the ordinary and recognized rule that the ton-mile rate should decrease as distance increases, other things being equal, and we therefore fail to see how the lower ton-mile rate for the greater distances from Memphis, St. Louis, and Louisville tended in any respect to show the unreasonableness of the rates here in question.

Finally, as a summing up of this part of the case, the Commission says: "The manufacturers and shippers of oil, paper, stovepipe, tinware, galvanized tubs, furniture, soap, window glass, paints, hardware, and other articles of like kind in daily use, testified that they were unable to trade in the Montgomery and Selma territory on account of the high rates, and that upon former occasions they had made special efforts to build up a trade with cities located in this territory and points basing thereon, but in every instance they were compelled to abandon the fight on account of better freight-rate concessions from other markets, though at greater distances. With

respect to practically all of the commodities above enumerated schedules of comparative rates and distances were filed corroborating complainant's contention."

This statement also can be explained only on the theory that it relates to what the New Orleans Board of Trade alleged in its complaints and to conditions which may have existed in some degree before the road made the reductions and adjustments alreadv mentioned. But having reference to the class rates in question, to which the Commission's order is confined, we are unable to find any evidence which tends to sustain the observations made with regard to the inability of New Orleans dealers to trade in the Montgomery-Selma territory.

Take, for instance, the testimony of George P. Thompson, a wholesale grocer of New Orleans, the first witness who has anything to say on the subject. His testimony has mainly to do with Mobile and Pensacola. But being asked by counsel whether it would be possible to increase his business with Montgomery if the rates were adjusted on a fair basis he says that it would; a self-evident proposition, but by no means showing that the rates in force were not what they ought to be. The further statement which he is led to make by suggestion of counsel, that the rates from Memphis to Montgomery are lower than from New Orleans, can not refer to class rates, it being irrefutably shown that they are in fact higher. And the comparison made by counsel in a long leading question with regard to the rates from Baltimore,

to which Mr. Thompson gives hesitating assent, is of no more significance than the similar comparison with other North Atlantic points made by the commission, already referred to. It is true that as to certain canned goods, such as beans and peas, he is handicapped, as he says, by the rates from such points as St. Louis and Memphis. But here again the reference must be to commodity rates which have been adjusted, and must have been so understood by the Commission, as it does not include peas and beans in the list of articles said to be discriminated against by the rates to Montgomery. And this must also be kept in view when it is said by Mr. Thompson that he is kept out of that territory unless he is willing to absorb a part of the rates; which is not true as to class rates, the only ones which are here in question.

W. O. Hudson, manager of the Marine Oil Company, the next witness, confesses that he knows nothing with regard to the Montgomery-Selma case. Being asked if he could do business in Montgomery if the rate were reduced to 13 cents a hundred, the reduction subsequently made by the Commission, he declares that he could not, that the rate would eat him up, the explanation that he gives being that the great bulk of the oil which he handles comes from the Ohio and eastern fields, which are much nearer to Montgomery than he is. Notwithstanding this, and although he is the only witness who testified on the subject, oil is given by the Commission as one of the commodities shut out by the high rates from New Orleans into this territory.

E. C. Palmer, a wholesale paper man, admits that business with Montgomery has not been materially injured by the advance in rates, but avers that it will be when his customers understand the situation. He thinks that Nashville has an advantage over New Orleans in the rate on paper (as no doubt it has); and that, as compared with Baltimore, considering the haul, the New Orleans rate is "a little out of line" (although it is not in fact higher); but that, compared with Louisville, it is fair enough. And so far as being kept out of Montgomery is concerned, he says that, on the contrary, he ships there constantly. No one can read the testimony of this witness without being convinced that, except possibly as to Nashville, New Orleans is not only not discriminated against, but has an actual advantage in the rates on paper over every place that it comes in competition with in the Montgomery-Selma territory.

A. D. McBride, a salesman engaged with the National Enameling & Stamping Company, says that he sells goods in Mobile and Pensacola, but not in Montgomery or Selma, because Atlanta, Ga., has lower rates and gets the business. As compared with St. Louis and Louisville he does not see that New Orleans is at a disadvantage, notwithstanding the efforts of counsel to have him say so. The competition which affects him is with Atlanta, and that is the whole of it. Nor even there does he charge that the advantage is an unfair one, but simply that the Atlanta rate to Montgomery is lower, and keeps him out of there. Notwithstanding this state of

the evidence, however, stovepipe, tinware, and galvanized tubs, the commodities that this witness deals in, he being the only one called to testify with regard to them, are included by the Commission among those which it is declared that New Orleans dealers on account of the high rates have been unable to sell in the Montgomery-Selma territory, being compelled to abandon the fight, as it is said, after an attempt to build up the trade, a statement as to which there is no approach in the testimony.

J. W. C. Wright, president of the New Orleans Furniture Manufacturing Company, says that Montgomery is not important to them. They ship some furniture there, but have not solicited the trade very strongly; and substantially the same thing is testified by P. Jung, of the Crescent Bed Company, an iron-bed manufacturer.

S. Steinhart, a manufacturer of soap, sells soap in Montgomery, where he says he encounters a rate of only 19 cents from Nashville as against 23 cents from New Orleans, but there is no 23 cent class rate from New Orleans, and he must therefore be referring to a commodity rate, which, as we have already seen, has no bearing.

J. W. Bray, another witness, who is treasurer and manager of the Campbell Glass & Paint Company, says that they are shut out of Montgomery and Selma, the rates being such that they are unable to ship there. But so far as the paint business is concerned, he also says that it is handled entirely from St. Louis, where his company has a house from which

they prefer to ship, the rate being more advantageous; and that as to their glass business, Montgomery is not a normal point for it, which hardly makes out that the rates from New Orleans are too high or that he has ever tried unsuccessfully to adjust them.

Harry Moore, who is in the wholesale hardware business, declares that he can not compete with St. Louis, Louisville, and Nashville; but he gives as a reason, that, while these places are only one-half the distance from producing centers, such as Pittsburgh and that territory, they pay one-third the rate, and are thus able to get into Montgomery and Selma, and places basing on them, at much less than he can. But the discrimination here, as is evident, is in the rates from producing centers to the distributing points named; and it is impossible to expect that this should be made up to New Orleans by a back rate to Montgomery that would absorb the difference.

It is difficult therefore to see, in view of the testimony of these several witnesses, how furniture, soap, window glass, paints, and hardware were included as they are in the statement by the Commission, which has been referred to.

George Weigand, who is in the provision business, and who has been "howling to heaven," as he says with regard to the rate increase complained of, refers only in this to the rates to Mobile, having never tried to go to Montgomery or Selma.

S. Odenheimer, a manufacturer of cotton goods, makes general complaint of the discrimination in rates from all competitive points where there are cotton mills to Montgomery and Mobile. But it appears from his testimony that there are cotton mills at Montgomery and Mobile as well as at New Orleans, to say nothing of the other places mentioned, and it is altogether unreasonable to expect that rates on cotton manufactures should be put so low that mills at other points shall be able to compete with those actually on the ground. The Commission makes no reference to cotton goods in connection with the Montgomery rate, and therefore evidently took this view. Mention was also made by this witness, that the rates southerly from Montgomery to New Orleans were lower than those northerly from the one place to the other. But the explanation given him by the company was that there are a good many empty cars going in the direction of New Orleans and none the other way, which might properly justify the distinction.

R. J. Wood, manager of the Gulf Bag Company, manufacturers of burlap bags, testifies that at one time, although not recently, they consigned goods to friends in Mobile to have them reconsigned to other points in Alabama, because the combination on Mobile was less than the rates through there. He also says that the question of the rates from New Orleans to Montgomery and Selma being higher than the combination on Mobile was an old one, and had been up ever since he was connected with the New

Orleans Board of Trade, some seven years, complaint being made and efforts put forth to correct it. All that his company have ever asked, as he says, is the same rates that eastern ports have to points halfway distant to New Orleans, which they have never got, and are therefore at a disadvantage. They have better rates, comparatively speaking, according to this witness, to the Carolinas than to Alabama and Georgia, and there are eighteen or twenty points in Georgia to each of which the mileage is less from New Orleans than from New York, Philadelphia, or Baltimore, and yet the rates are invariably higher; in consequence of which the southeast, for his company, is a dumping ground, where they get rid of any overplus, but do not expect to make money. They sell at Atlanta, but make nothing. That city is a bag consumer, but there is a bag concern there, and Atlanta itself complains of New Orleans. This extract from the testimony of this witness is perhaps unnecessary, as the Commission does not include burlap or gunny bags among the articles alleged to be discriminated against, so far as concerns the Montgomery-Selma territory. It is only Mobile as to which this is predicated with regard to these articles, and it will be noted that what he says has no application to Mobile.

In this connection a protest, dated August 6, 1902, drawn up by the attorney of the New Orleans Board of Trade, was introduced in evidence before the Commission, in which the existence of discriminating rates against New Orleans into the southeastern territory

was charged, the fact that the through rate to Montgomery and Selma was higher than the Mobile combination being also mentioned. New Orleans and Mobile, as it is there contended, stand in the same relation to the sources of supply and are competitors to points beyond them, and claim is made that outbound rates from New Orleans should therefore carry but slight differentials. The rest of the paper is mainly an argument why New Orleans should be put on an equality of rates which would permit of competition with New York and Baltimore as well as Georgia, the Carolinas, and Virginia—a broad question not in issue here, as already pointed out, and therefore not relevant or properly to be considered.

This completes the evidence on this branch of the case and there is no need to dwell on the view to be taken of it. Considered severally or collectively, it contains nothing which we can discover that supports the conclusions of the Commission with respect to the Montgomery rates, outside of the fact that, if the reduction is to stand to Pensacola and Mobile, it calls for a reduction to Montgomery to equalize the sum of the locals. It is not simply that the weight of the evidence does not sustain the reasons assigned by the Commission in its report, but that there is no substantial basis for those reasons in the testimony passed upon.

The Mobile and Pensacola rates remain to be considered, both on their own account and as the essential basis of the rates to Montgomery. It is to be noted with regard to these that as the law then stood the

mere fact that they were increased by the company over what they had been previously creates no presumption that they were not fair and reasonable. (*Interstate Commerce Commission* v. *Chicago Great Western Railroad*, 209 U. S., 108.) Nor did it justify the Commission in putting them back to what they had been, without regard to whether that could be properly said of them. But this again is practically all that there is to sustain the Commission's action. It is undisputed that these rates to Pensacola and Mobile were the result of severe water competition, and that this had disappeared at the time of the increase. "At the date of the hearing," say the Commission, "carriage by water was infrequent and cut but little figure as a competitor" with the railroad. It is also stated that while the rates by rail were generally higher than by water, this was not the case in the third, fourth, and fifth classes, under which the bulk of the freight between New Orleans and Mobile moved; notwithstanding which, the Commission proceeded to reduce the rates for these classes to what they had been before, actually making them 6, 9, and 8 cents, respectively, below the established water rates as they then stood.

Take also the relative result brought about by the Commission's action. It may be that no point should be made of the fact that, taking the rate on first-class goods, which the Commission accepts as fair, having made no change in it, the other rates are disproportionately low by comparison. This is the uncontradicted testimony of some of the witnesses,

though it may be said that the Commission was not bound to adopt their view of it. But that there is a material disparity is observable on the face of things, and also that it breaks in upon the ratio established by the railroad, which was accepted and lived up to all these years—a somewhat significant circumstance. More than that, however, in making the rates on fifth and sixth class goods 35 cents each to Montgomery and 15 cents each to Mobile, while they are 20 and 15 cents, respectively, to Pensacola, the classification is inconsistent, to say nothing of the testimony of some of the witnesses, who assert without contradiction that if 15 cents is correct for the sixth it is too low for the fifth class; while in fixing the rate to Montgomery at 77 cents on second class and 55 on third class—based on a 37 and 25 cent rate to Mobile, respectively—there is a drop of 22 cents, which, according to the undisputed evidence, creates a disproportion between these two classes that is unprecedented in all that territory. And the same is true as to the 12-cent drop between these classes in the rate to Mobile, which is a reduction of 33 per cent on the face of one and 50 per cent on the face of the other, according to the one that is taken for comparison. It is no answer as to any of these Mobile rates that there were the same inconsistencies in the formerly prevailing rates of the railroad. These were competitive rates with respect to which nothing reliable can be predicated without knowing just what produced them. The resort to them for justification in this way merely serves to demon-

strate the intimate relation which they bear to the order of the Commission.

It is said, however, in the report of the Commission that the Mobile and Pensacola rates had remained substantially unchanged for over 20 years, and that there was no evidence that they had not been compensatory. At the time this statement was made the increased rates were in force which were established in 1907, and not the old ones in existence before that. And it was the unreasonableness of these new rates which the complainants in the proceeding had the burden of showing. There was no adverse presumption to be indulged, as we have seen, because of the increase. (*Interstate Commerce Commission* v. *Chicago Great Western Railroad*, 209 U. S., 109.) Nor is a voluntary rate, established to meet competition, to be taken as the measure of what is reasonable. (*Lake Shore R. R.* v. *Smith*, 173 U. S., 684; *Frederick* v. *N. Y., N. H. & H. R. R.*, 18 Inter. Com. Com. Rep., 481, 484; *Breese* v. *Trenton Mining Co.*, 19 Inter. Com. Com. Rep., 598, 600.) And yet that in effect is just what the Commission did in suggesting, in defense of the reduction and restoration which it undertook to make, that the previous rates were not shown negatively not to have been compensatory. It was not incumbent on the railroad at that stage to make this out, but on the complainant to show that the rates as they stood were unjust and unreasonable. The position taken here, on behalf of the Commission, is that a rate, however low, can not be condemned as unjust if it yield any, the most

insignificant, return above the cost of service, a proposition we are not prepared to accede to.

As further justifying the reduction made, it is declared by the Commission that the rates to Mobile and Pensacola exceeded the rates from New Orleans to other water-transportation points, such as Natchez, Vicksburg, Greenville, and Memphis, where the distances are greater. This clearly is not true as to Mobile, whatever may be the case as to Pensacola. The rates from New Orleans to the Mississippi River points mentioned, as contrasted with those to Mobile, according to the schedule at the time on file with the Commission, will appear by the following table:

	Classes—					
	2	3	4	5	6	E
Rates to Natchez, Vicksburg, Greenville, and Memphis	40	32	25	20	17	15
Rates to Mobile as reduced by the commission.	37	25	18	15	15	15

It may be that the Commission in the statement which it made had the rates in mind as raised by the railroad, as to which, however, it would be true only with respect to the third, fourth, and fifth classes. But that is not the way it is put, nor is it the use made of it in argument, which is that the rates to Mobile as they previously stood and as they were reduced and restored still exceeded those to the other water-transportation points which are mentioned, which is a clear misapprehension.

It is also said by the Commission in the same connection that these rates exceed those from Nashville, Memphis, Cincinnati, and Louisville to points approximating the same distance. There is no way of knowing on what this is predicated, there being no reference to any schedules or tables of comparison by which to verify it. Neither is there anything in the evidence before the Commission which apparently warrants it. And by contrast, in the evidence taken under the bill which is now before us, it is proved without contradiction that in a large number of instances the fact with regard to the rates from the places named is just the opposite.

Another ground taken by the Commission to justify its action is that the rates between New Orleans, Mobile, and Pensacola, until the advance made by the railroad, were identical in both directions, westward as well as eastward, a condition which prevailed, as it is said, between other cities, such as New Orleans, Memphis, Greenville, Vicksburg, and Natchez, and that the raising of rates in the one direction resulted in a disturbance of relations between points where geographic and commercial conditions called for equality. But it has often been recognized by the Commission that the mere fact that a rate is higher one way between the same points than it is the other does not prove that the higher rate is unreasonable. (*Duncan* v. *Atch., Topeka & Santa Fe*, 6 Inter. Com. Com. Rep., 85, 103; *McLoon* v. *Boston & Maine R. R.*, 9 Inter. Com. Com. Rep., 642; *Weil* v. *Pa. R. R.*, 11 Inter. Com. Com. Rep., 627.) And

this is particularly true where there is a preponderance of empty cars moving in the one direction, of which there is here some suggestion. There is also some evidence that the rates westward from Mobile to New Orleans are lower than they should be; all of which goes to show that there is practically nothing to be made out of this contention.

It is further said by the Commission that the advances made from New Orleans to Mobile in the enumerated classes were severely felt by certain shippers in the former city, especially those engaged in jobbing canned goods, lard, flour, coffee, oil, crackers, pickles, vinegar, beans, etc.; that New Orleans is an important distributing market for canned beans, some four hundred to five hundred carloads being handled there; and that the increase on this commodity was particularly burdensome, if not practically prohibitory of shipping into New Orleans and out to Mobile. That the advances made in the rates on these classes of goods would be severely felt by certain shippers is not a sufficient reason for holding that they were not what they ought to be. Such an advance would of course be felt, and so would any other change in market conditions which affected the cost of handling. With regard to the other statements made by the Commission in this connection, it is undoubtedly true that New Orleans and Mobile are both jobbing points; but so far as concerns beans, they get their supply from practically the same markets and at the same freight rates. In this respect they are rivals; and it is altogether out of

line to expect that the rates on beans from New Orleans to Mobile should be so reduced that the jobbers in New Orleans can compete with those in Mobile, and thus invade the latter's own home market. A counter protest from the jobbers in Mobile, if this were done, would be in order as a matter of self-protection, and would have to be listened to. The same is true with respect to the other commodities named; as it is also with regard to paper, stovepipe, tinware, tubs, and galvanized-iron tubs, as to which, according to the Commission, the advance in rates made by the railroads would have to be absorbed by the manufacturers.

The evidence with regard to all this is not in conflict. Take, for example, the testimony of George P. Thompson, president of the New Orleans Grocers Association, which has already been referred to in connection with the rate to Montgomery. He has been selling canned goods, crackers, and baking powder at Mobile for a number of years, as he says, and the advance in rates, according to his statement, has affected him materially. There has also been a serious falling off in peas and beans, particularly the black-eyed beans which are dried in bags, the best coming from California. Mobile, as he says, is a large consumer of these for export and otherwise, and if New Orleans is shut out from there, it means a control of the bean business by the railroad. But he admits that Mobile can buy beans from California as cheaply as he can, and that the rate from there to each of these two cities is the

same. And he, therefore, when you come to analyze it, simply wants the local rate from New Orleans to Mobile kept down to a point where he can have a chance to compete at Mobile or places basing on there with the Mobile jobber on the same product. So also with regard to canned goods, baking powder, candles, etc., the rates on which from Memphis to Mobile are shown to be less than from New Orleans; the comparison so made is of no particular significance without a consideration of how the rates from Memphis happen to be what they are (whether these rates are class or commodity), and why that city enjoys this apparent advantage. Mr. Thompson also speaks of New Orleans as a great distributing port for olive oil and coffee, and thinks that recognition should be given it on outbound rates accordingly; but except that Mobile buys oil from New Orleans he makes no application of his statement.

W. O. Hudson, manager of the Marine Oil Company, says he is forced into competition at Mobile with oil from the Ohio oil field, from whence also he gets his supply from the National Refining Company, which has refineries at Cleveland, Marietta, and Findlay. He stocks up for Mobile from there, but it would suit him better to do so from New Orleans, which would relieve him from the necessity of carrying so many men, and where his facilities are greater. These purely personal considerations have no bearing, of course, on the reasonableness of these rates, which are not to be fixed to accommodate any particular person's business.

There is but one witness, Mr. E. C. Palmer, who has anything to say about the paper industry. Testifying eight months after the advance in rates had gone into effect, while he feels that it may be injurious when his customers get onto the idea, he admits that so far it has not been so. His concern also is only as to goods going through Mobile to points beyond and not as to Mobile proper, although he does business there. New Orleans, as he says, is the principal distributing point in the South for newspaper material, competing with St. Louis, Cincinnati, and Nashville, but having an advantage in rates, as a rule, from western points of manufacture, the rates to New Orleans and to Mobile being equal. There would seem to be nothing calling for relief in this situation.

So, also, with reference to stovepipe, tinware, tubs, and galvanized tubs, Mr. McBride, of the National Enameling Company, says that the manufacturers have not been compelled to absorb the advance, as stated by the Commission, although he thinks it probable in the end that they may have to do so. Prices have been increased to the extent of the advance, but no one in Mobile has declined to buy on account of it. It simply has increased the cost to the jobber, and he, in turn, sells higher to the retailer. He admits that the New Orleans manufacturers still have a lower rate to Mobile than any other point with which they come in contact; but the difference is slight, and it would take but a small advance to equalize it. The trade at Mobile has been accus-

tomed to buy goods delivered, and it is going to be difficult, as he says, to get the increase from them in the future, although the New Orleans manufacturer is now doing so. Under normal conditions the manufacturers would have to absorb the advance and keep the Mobile jobber on a par with others, but now it is done by the jobber.

There is nothing in any of this to sustain the findings of the Commission which have been referred to, or to justify the reduction which it has ordered. The rates to Mobile were so low before that the manufacturers in New Orleans could afford to absorb them and did so. They can not perhaps afford to do so now. And because the Mobile jobber has become accustomed to get his goods free, the manufacturers in New Orleans anticipate trouble. But this is a possibility which the railroad can not be required to prevent; and the situation as disclosed by this witness indicates that the former rate was certainly low.

Again, the Commission makes the statement that the advance in rates on furniture, iron beds, etc., had practically closed out the business with Mobile in these articles, better rates being made on them from other manufacturing points, such as Atlanta, Ga., and High Point and Winston-Salem, N. C. This is a clear mistake of fact, due, no doubt, to inadvertence, but none the less serious, it being the uncontradicted evidence that, with one single exception, where the rate from Atlanta to Mobile is a cent lower than from New Orleans, all the rates on all

the articles named from the three places mentioned are not only higher, but very materially higher, than from New Orleans. It is true that, according to Mr. Wright, there is a restrictive loading rule with regard to furniture from New Orleans to Mobile which is not imposed as to Nashville and Memphis. But this does not apply to any other points, and, while it apparently gives some advantage to Memphis over New Orleans, Nashville is simply put on an equality with it. It is to this rule, also, and to the changed classification of mixed furniture in car loads, that he ascribes his loss of trade, rather than to the present rate advances.

The testimony of P. Jung, another iron-bed manufacturer, is even less to the purpose. He says he never sought the Mobile field nor made any effort to get into Pensacola and has not been affected by the advance in rates to these places. Before the advance he solicited business throughout Alabama and Georgia, but found that he would have to guarantee rates as against Atlanta, High Point, and Winston-Salem, and that the trade did not warrant it. Evidently the increase did not harm nor would the reduction help him.

This is all the evidence there is as to furniture and iron beds, and it is clear that it does not in any particular support the statement of the Commission.

It is further said, however, by the Commission that the advance in rates on bags, burlap, gunny, and jute, was vigorously opposed and a strong protest also made on account of the alleged discrimination

against New Orleans in cotton goods, it being asserted that other manufacturing points were given more favorable rates. This is sought to be sustained as to cotton goods by a comparison of rates from Virginia and North and South Carolina points, as well as from Augusta, Ga., and even from New York and Boston. The suggestion that the advance was vigorously opposed or that a strong protest was made affords neither evidence nor argument. This is always to be looked for where there is an increase in prices, whether warranted or unwarranted. Nor is anything more to be made out of the rate comparison. The Commission does not say that the rates to Mobile on cotton goods are less from other manufacturing points than from New Orleans, which is not the fact, as is demonstrated by the evidence, but only that the rates are more favorable. But this is based on the mere matter of distance, which is no criterion, as already stated, without the consideration of other attending conditions. As pointed out also in connection with the Montgomery rates—according to the testimony of Mr. Odenheimer, on which this part of the case is evidently based—there are cotton mills both at Mobile and Montgomery, as well as at the other competing points named, and it is not to be expected that rates on cotton goods should be put so low that New Orleans manufacturers would have an advantage over all others in that territory beyond what they already have; which would be the rankest discrimination. And the matter of burlap and gunny bags is not much different. The testimony of Mr.

R. J. Wood is directed to this and has already been considered in another connection. So far as Montgomery and Pensacola are concerned, he frankly says that the advances have not injured his business. His complaint is as to points beyond, with regard to which he has not a little to say, but it has been discussed above and there is no occasion to again go over it.

This completes the case as to Mobile; and that with regard to Pensacola, except that it is still weaker, is no different. It is said by the Commission that the advance in rates "was not so heavy or so injurious to the merchants in New Orleans in their trade with Pensacola as the advance to Mobile, but they strongly protested against it, and it was shown that, proportionately, like conditions resulted from the advance as were produced by the increase in rates to Mobile." But there is nothing to sustain this statement. One witness, Mr. Palmer, a paper dealer, says that he would be affected in Pensacola the same as Mobile; but he is not affected at all at Mobile and can not, therefore, be at Pensacola. Another, Mr. Steinhart, who deals in soap, says that they get no orders from Pensacola because the rate is said to be so high; and what he wants and thinks the company should come down to, as he is not slow in saying, is a 10 or 12 cent rate, the same as on rice and sugar, which is hardly to be expected. The other witnesses called, to a man, declare either that they have no complaint to make or that their business at Pensacola is slight or that they have not been affected; and yet the Com-

mission finds with regard to the trade with Pensacola what has just been stated.

Opposed to the evidence which has been thus referred to—if there can be said to be any opposition to what is so irrelevant and wanting in persuasiveness on the question as to what is reasonable—there are several witnesses produced by the railroad company of large experience, who testify that the rates prescribed by the Commission, both to Mobile and Pensacola, as well as to Montgomery, are unjust and unfair, under all the circumstances, and among others; because they are less than those usually and ordinarily charged by the company, as well as by other railroads for the transportation of like classes of property between other points in the South separated by similar distances; because the rates which were cut down permitted a free movement of traffic and there were no competitive or commercial conditions calling for a reduction; and because the rates as reduced would give to New Orleans an undue and unreasonable advantage and preference over Vicksburg, Memphis, and other Mississippi and Ohio crossings, and would disrupt and destroy the relative adjustment and the general system of rates which have prevailed in the southeastern territory ever since the Cooley arbitration. It is also indisputably shown that the New Orleans-Mobile line along the Gulf coast is exceptionally difficult and costly to operate; that a considerable portion of it consists of long trestles and bridges which are subject to extraordinary damage and sometimes to a complete

destruction by floods and freshets in the streams which they span; that its proximity to the Gulf lays it open to the full force of the Gulf storms and hurricanes, by which it was entirely put out of business for nearly a month in the early fall of 1909, and for considerable periods at different times previously; that the intermediate territory traversed is so sparsely settled and its freight traffic so small that the successful and profitable operation of the line is necessarily dependent on the through traffic between New Orleans and Mobile and points beyond, in consequence of which the company has never received even a fair return from its operations; and finally, that the cost of operation by reason of the increase in wages, in maintenance, and in the price of locomotives, cars, and other matters of equipment, has grown so enormously in the last few years that to go back to rates established under earlier conditions, when there was active water competition, instead of being fair and reasonable, is to work great and manifest injustice in disregard and in the face of this undisputed showing.

There was no attempt to meet the case as so made out for the company either by way of argument or otherwise. Counsel for the Commission and for the Government simply rely on the authority of the Commission to determine what is a reasonable rate and the conclusiveness of its judgment where it has done so, against which, it was argued, the courts can afford no relief unless the rate which has been fixed is shown to be confiscatory. But this contention,

as presented and sought to be applied in the case at bar, must be rejected. In our judgment, it was never intended to confer on the Commission any such unrestrained and undirected power. As already pointed out, the law provides for a hearing and it must be more than a shadow. Both parties are entitled to be confronted with the evidence on which the case is to be determined, and the conclusion reached must be a reasonable inference from the facts disclosed by the investigation. This construction of the Commission's authority and the conditions which limit its exercise appear to us clearly and definitely settled by the recent decision in *Interstate Com. Com.* v. *Union Pacific R. R., supra,* which is the latest and fullest utterance of the Supreme Court in a case of the same general class as the one now under consideration. Tested by the principles laid down in that decision, we are of opinion that the order here drawn in question must be held invalid as exceeding the delegated powers of the Commission, because there was no substantial evidence to sustain it. It is not merely that the evidence preponderates in favor of the reasonableness of the rates which have been cut down. Concededly, that would not be enough to challenge the action of the Commission. Not only is the Commission vested with a discretion which can not be disturbed, and which we intend unqualifiedly to respect, but it is entitled to select the testimony which it will believe and rely upon, according as it addresses itself to the discriminating judgment of the Commission. But it is not within the authority of the

Commission to reduce the rates in this or any other case not merely against the weight of the evidence produced to sustain them, but without anything substantial to warrant the conclusion reached or the reasons assigned therefor. And this we are convinced is a case of that character. The only discoverable basis for condemning the rates to Mobile and Pensacola is the fact that they had been advanced in 1907, and this of itself was clearly not sufficient. *Interstate Com. Com.* v. *Chicago Great Western*, 209 U. S., 108. If the long continuance of lower rates to these points or the circumstances connected with their increase called for explanation, as suggested in the case cited, the explanation made by the carrier, in the absence of anything to discredit it, must be held to sustain the advance as against any presumption that it was unreasonable, and therefore there was nothing substantial to support its condemnation. Nor is there anything of substance to sustain the reduction of the Montgomery rates except the fact that they exceeded the former combination on Mobile and Pensacola. Outside of these facts, having regard to the undisputed evidence adduced at the hearing, the existing rates were not shown to be unjust or unreasonable and there was therefore no valid basis for the Commission's conclusion.

And the petitioner is therefore entitled to a decree annulling the order.

MACK, *Judge*, dissents.

United States Commerce Court.

No. 4.—April Session, 1911.

Louisville & Nashville Railroad

v.

Interstate Commerce Commission, respondent.
United States, intervening respondent.

ON FINAL HEARING ON BILL, ANSWER, AND PROOFS.

For opinion of Interstate Commerce Commission see 17 Inter. Com. Com. Rep., 231.

For opinion of Circuit Court, refusing preliminary injunction, see 184 Fed., 118.

Mr. Helm Bruce and *Mr. W. G. Dearing* for petitioners.

Mr. W. E. Lamb for Interstate Commerce Commission.

Mr. J. A. Fowler, Assistant to the Attorney General, and *Mr. Blackburn Esterline,* special assistant to the Attorney General, for the United States.

Mr. Alfred P. Thom and *Mr. Walker D. Hines* for Southern Railway.

Mr. Edward Barton for Baltimore & Ohio Southwestern Railroad.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[March 12, 1912.]

MACK, *Judge*, dissenting:

The salient facts briefly stated are that prior to August, 1907, the through rates on certain classes from New Orleans to Montgomery exceeded the combination of rates in force from New Orleans to Mobile and Pensacola, respectively, and from these places to Montgomery. All of the rates had been in force for many years. No change has been made in the rates on that part of the road between Mobile and Pensacola, respectively, and Montgomery, but in August, 1907, the rates from New Orleans to Mobile and to Pensacola, were advanced exactly enough to make the combination on these points equal to the through rate from New Orleans to Montgomery. While the railroad attempts to justify this advance by the assertion that the former rate was unreasonably low, having been put into effect many years before in order to cut out water competition, nevertheless it is admitted that the immediate cause of the advance was the announcement by the Commission of the rule that a through rate must not exceed the combination of the locals. To comply with the rule, it was necessary either to reduce the through rate from New Orleans to Montgomery to the sum of the locals or to raise one or both of the latter. The railroad chose the latter alternative; the Commission, by its order, endeavored to compel it to adopt the former.

The Commission could do this only if it found that the new rates from New Orleans to Mobile and Pen-

sacola, respectively, and the unchanged rate from New Orleans to Montgomery were unreasonably high. If, on a review of the record before the Commission, this Court finds that there was no substantial evidence on which to base such a conclusion, it would be our duty to annul the order, inasmuch as the power of the Commission to reduce rates to a reasonable figure is conditioned on the opinion of the Commission, formed after a full hearing, that the tariff rate is unreasonably high; not its arbitrary and uncontrolled opinion, but its deliberate judgment based on substantial evidence produced at the hearing prescribed by the act.

While this principle is that adopted in the opinion of the Court, I differ with my brethren in the application of it to the facts of this case. Whatever view I might have taken as to the reasonableness of the tariff rates had I been a member of the Commission, I can not find that there is no substantial evidence to support the conclusions reached by it that they are unreasonably high.

Let us first consider the raised rates from New Orleans to Mobile and Pensacola. While, as the majority of the court state, there is no presumption that they are unreasonable merely because the old rates have been raised, yet there is likewise no presumption that they are reasonable merely because the carriers have put them into effect. When a rate is attacked immediately after it is made, there is no presumption either for or against its reasonableness. If

it has been in force for some time and traffic has moved freely under it, a presumption does arise that it is reasonable. That presumption would be sufficient to make out a prima facie case in favor of the reasonableness of the rate to which it applied and therefore to shift the burden of going forward with some evidence that it is unreasonable.

Apply these fundamental principles to this case. There is no presumption one way or the other as to the new rates. The ultimate burden of proof, at the time of this hearing and until the amendment of 1910, was on the shippers to show their unreasonableness. The absence of any presumption that they are reasonable was demonstrated when it was shown that they were put into effect just prior to this complaint; and a prima facie case that the old rates are reasonable and the raised rates therefore unreasonable was made out when it was proved that the former had been in force for many years.

The burden of going forward with evidence that will meet this prima facie case, or in other words, the obligation to give some valid explanation of the increase, now devolves on the carrier. This may be satisfied by showing that the old rates were compelled by water competition and that they are unreasonably low by at least the amount of the increase. But if the shippers prove that these water competitive rates had continued for many years after actual water competition in any real sense had ceased, and under conditions clearly negativing any danger of a recurrence thereof,

the presumption of their inherent reasonableness again arises, and may, in the discretion of the Commission, be deemed sufficient proof thereof.

The testimony before the Commission tended strongly to show that no renewal of water competition was feasible after it had once ceased to be a factor in the transportation situation, because of labor conditions, wharf control by the railroads, and the justifiable fear that an investment in steamers by the shippers or others would be rendered worthless, inasmuch as the railroads would cut their rates to any extent necessary to secure the business. It must be remembered in this connection that at that time and until the amendment of 1910 railroads could cut their rates without restraint in order to destroy competition, and after accomplishing that purpose raise them again without the consent of the Commission.

On these considerations alone and disregarding any other evidence the action of the Commission in finding the new rate unreasonably high to the extent of the increase over the old rate from New Orleans to Mobile and Pensacola, respectively, ought, in my judgment, to be sustained as against the charge of arbitrary or unjustified action.

We come next to the consideration of the New Orleans-Montgomery rate. A presumption of its reasonableness arises from the fact that it had been long in force. To overcome this presumption, the shippers showed, first, that it was customary both

on this and other roads not to charge more for the through rate than the combination of locals, although admittedly this custom had not been enforced for this particular through traffic; secondly, that the Commission had now adopted a rule in accordance with the custom.

Whatever the concession of the counsel for the Government may mean—and in my opinion it does not go so far as the majority of the court believe—the fact alone that the through rate exceeds the combination of locals is, in my judgment, an all-sufficient reason for a reduction to the extent of the excess. There may be peculiar and extraordinary circumstances which will cause the Commission to refrain from compelling such a reduction, but ordinarily, and in the present case, the increased cost to the carrier of handling two local shipments and the economic waste involved therein as against a single through shipment, if the shipper should exercise his legal right of shipping from New Orleans to Mobile and then from Mobile to Montgomery on the local rates, amply justified the Commission in promulgating its rule and in enforcing it by the reduction of the New Orleans-Montgomery through rate. Congress, moreover, has now, by the amendment of 1910 to section 4 of the act to regulate commerce, given this rule the force of law.

That the reduction ordered by the Commission in the New Orleans-Montgomery rate was exactly enough to make the through rate equal the com-

bination of locals as reduced is no more peculiar than that the increase by the carrier in the local New Orleans-Mobile and New Orleans-Pensacola rates was exactly enough to make the combination of locals as increased equal the former through rate. And when the principal witness of the carrier testifies (p. 323 of the testimony before the Commission) that in his judgment the raised rates "from New Orleans to Mobile are not too low, and I do not think they are too high," in other words, that they are exactly right, and he so testifies notwithstanding his frank admission (p. 272) that the cause of the raise was to check the application of the new rule to the old rates, the Commission can not, in my judgment, be said to have acted arbitrarily in not accepting this view of the result effectuated by the raise.

While I differ with my brethren in their criticism of a number of statements made in the report of the Commission, it is unnecessary to discuss them here. For example, the view taken by the Commission of the Cooley adjustment is fully justified, in my judgment, by the fact that the relation of rates thereby established in 1886, was departed from not as to some, but as to a great many commodity rates and that, too, at many times; even as to class rates, there were departures not only in 1896, but also in 1905.

Even though some errors of fact may be found in the report, these are clearly not the real basis of the order. Moreover, if any inequalities or undue preferences as against other localities result from the order of the

Commission, they may be remedied on proper complaint, by the proper parties, to the Commission.

The majority opinion is confined to a single question, and I have for that reason limited this dissent to a consideration of it. Without, therefore, discussing the many interesting questions of confiscation and jurisdiction presented in the briefs and oral arguments, it suffices at this time to state that, in my opinion, the other grounds urged against the order of the Commission are equally unavailing and that the petition should be dismissed.

United States Commerce Court.

No. 5.—May Session, 1911.

James J. Hooker and Ezra E. Williamson, respectively, President and Secretary of the Receivers and Shippers' Association, of Cincinnati, Ohio, petitioners,

v.

Interstate Commerce Commission and The Cincinnati, New Orleans & Texas Pacific Railway Co., respondents.

United States, intervening respondent.

Mr. Francis B. James, for the petitioners.

Mr. James A. Fowler, Assistant to the Attorney General, and *Mr. Blackburn Esterline,* special assistant to the Attorney General, for the United States.

Mr. P. J. Farrell, for the Interstate Commerce Commission.

Mr. Frank W. Gwathmey and *Mr. R. Walton Moore,* with whom *Mr. Edward Colston* was on the brief, for the respondent carrier.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[July 20, 1911.]

CARLAND, *Judge:*

In this opinion, for the sake of brevity, the Cincinnati, New Orleans & Texas Pacific Railway Co. will be abbreviated C., N. O. & T. P.; The Interstate Commerce Commission will be abbreviated Commission; the Louisville & Nashville Railway Co. will be abbreviated L. & N.; and the Nashville, Chattanooga & St. Louis Railway Co. will be abbreviated N., C. & St. L.

Petitioners are firms, partnerships, and corporations engaged in various kinds of mercantile, commercial, industrial, and manufacturing pursuits in Hamilton County, Ohio, and manufacture and produce goods, wares, and merchandise, and sell annually large quantities thereof of great value, alleged in the bill to be several hundred thousand dollars, to purchasers located at Chattanooga, Tenn., which said goods, wares, and merchandise are enumerated in the freight tariffs and classifications governing the same of the respondent, C., N. O. & T. P. Said petitioners have invested in building up and maintaining their respective lines of business an amount exceeding the sum of $25,000,000.

The C., N. O. & T. P. is a corporation duly organized under the laws of the State of Ohio and is a common carrier engaged in the transportation

of goods, wares, and merchandise by railroad from the city of Cincinnati, Ohio, to the city of Chattanooga, Tenn., the northern terminus of said C., N. O. & T. P. being at Cincinnati and the southern at Chattanooga.

On the 14th day of July, 1910, petitioners filed their bill of complaint in the Circuit Court of the United States for the Southern District of Ohio, Western Division, for the purpose of obtaining a judgment of that court setting aside and annulling an order of the Commission dated February 17, 1910, but in fact rendered May 24, 1910, and which order is in the following language:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present rates of defendant the Cincinnati, New Orleans & Texas Pacific Railway Co. (lessee of the Cincinnati Southern Railway) for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn., are, to the extent that said rates exceed the rates named in paragraph 3 hereof, unjust and unreasonable.

"2. It is ordered, That said defendant be, and it is hereby, notified and required to cease and desist, on or before the 15th day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting its present rates for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn.

"3. It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before the 15th day of July, 1910, and maintain in force thereafter during a period of not less than two years, rates for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn., which shall not exceed the following, in cents per 100 pounds, to wit:

Class	1	2	3	4	5	6
Rate	70	60	53	44	33	29

The C., N. O. & T. P. and the Commission filed demurrers to the bill. Subsequently the case was transferred to this court under the provisions of section 6 of the act to create a Commerce Court and to amend the act entitled "An act to regulate commerce," and the cause has now been submitted for decision upon the bill and demurrers.

The bill of complaint is quite voluminous, consisting, exclusive of exhibits, of 66 printed pages. The material allegations, however, which in our judgment are necessary to be considered in order

to dispose of the case may be stated briefly as follows:

In 1894 the Commission decided the cases of *Cincinnati Freight Bureau* v. *C., N. O. & T. P.*, and *Chicago Freight Bureau* v. *L. & N., et al* (6 I. C. C. Rep., 195). These proceedings had been instituted by the commercial interests of Cincinnati and Chicago for the purpose of correcting an alleged discrimination in rates upon the numbered classes from points of origin in the Central West as compared with rates from points of origin in the East, to southern territory. The complaint of the Chicago Freight Bureau alleged that the rates for the transportation of freight from western to southern points upon the numbered classes from Cincinnati and other Ohio River crossings to southern points of destination were excessive, and that the rates from Chicago were even more excessive. Under this allegation the Commission held that it might inquire into the inherent reasonableness of these rates, and proceeded to dispose of the case upon that ground. The Commission held that the rates from Cincinnati were too high and should be materially reduced. The following are the rates then in effect from Cincinnati to Chattanooga and those ordered by the Commission, showing the reductions made:

Classes	1	2	3	4	5	6
Rates in effect	76	65	57	47	40	30
Reduced rates	60	54	40	30	24	22
Reductions	16	11	17	17	16	8

48250—S. Doc. 789, 62-2—12

The order of the Commission made in pursuance of this decision was not complied with by the carriers, and the Commission thereupon instituted proceedings in the Circuit Court for the Southern District of Ohio to enforce obedience to its requirements. Such proceedings were had in that suit that the Supreme Court of the United States finally directed a dismissal of the bill of complaint upon the ground that the act to regulate commerce as it then stood conferred no authority upon the Commission to establish a rate for the future; that this order was in effect the fixing of a future rate and therefore without warrant of law and void. (*I. C. C.* v. *C., N. O. & T. P.*, 167 U. S., 479.)

When the interstate commerce law was amended in 1906 by giving to the Commission power to fix and establish a rate for the future, the Receivers & Shippers Association of Cincinnati commenced proceedings before the Commission and against the C., N. O. & T. P. and the Southern Railway Co. for the purpose of obtaining the benefit of the holding of the Commission in the former case. As a result of a hearing had by the Commission in the proceedings last mentioned, the order complained of in this action was made.

It is claimed by the petitioners that the maximum rate fixed by said order is much too high and is extortionate, so much so that the Commission in making the order violated the fifth amendment to the Constitution of the United States which prohibits the taking of private property without due

process of law or without just compensation. While said order of the Commission was in full force and unsuspended in any way, the C., N. O. & T. P. put into effect a schedule of rates for the transportation of freight between Cincinnati, Ohio, and Chattanooga, Tenn., in accordance with the maximum fixed by the Commission, and said rates are still in force.

In the report of the Commission, which is made a part of said order, it is found as follows:

"If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission."

This language of the report refers to the finding made by the Commission in 1894, and the reductions made then by the Commission appear in the table heretofore mentioned in this opinion.

The bill in this case also alleges that if the schedule of rates fixed by the Commission in 1894 had been in force or had been applied during the years 1903 to 1908, both inclusive, the yearly average net profit of the C., N. O. & T. P. would have been 40.66 per cent. It also appears from the bill of complaint that the city of Cincinnati owns the line of railroad between the city of Cincinnati, Ohio, and the city of Chattanooga, Tenn., which is commonly known as

the Cincinnati Southern, and now and during the times metioned in the bill operated by the C., N. O. & T. P. The road originally cost the city of Cincinnati $18,000,000, and the city subsequently spent for terminal facilities $2,500,000, making a total cost of the Cincinnati Southern to the city of Cincinnati of $20,500,000. The C., N. O. & T. P. leased this property, and is still leasing it, and the basis of rental returned to the city of Cincinnati prior to 1906 was 6 per cent, and 5 per cent subsequent to that date. The C., N. O. & T. P. owns its own equipment and never did have any interest in the Cincinnati Southern beyond the right to use the property under the terms of the leasehold. The capital stock of the C., N. O. & T. P. for the years 1903 to 1908, both inclusive, was $5,000,000, divided into $3,000,000 of common stock and $2,000,000 of preferred stock, and about the year 1908 it increased its capital stock by adding $500,000 of preferred stock, making its entire issued capital stock for 1908 $5,500,000. The value of the property of the C., N. O. & T. P. between the years 1903 and 1908, both inclusive, was $5,000,000, and after 1908 was $5,500,000, and was all the property of the C., N. O. & T. P. devoted to and employed in the public service and use and for the public convenience.

The C., N. O. & T. P. is a single-track railroad from Cincinnati to Chattanooga, a distance of 336 miles, without branches, and has an average gross earning per mile of $26,082.66. The L. & N. runs

from Cincinnati to Louisville, and from Louisville to Nashville, the distance from Cincinnati to Louisville being 114 miles and the distance from Louisville to Nashville being 185.9 miles. The distance from Cincinnati to Nashville via the L. & N. is thus shown to be 299.9 miles. Nashville is connected with Chattanooga by the N., C. & St. L., the distance from Nashville to Chattanooga being 151 miles, making the distance from Cincinnati to Chattanooga, via the L. & N. from Cincinnati to Louisville and Louisville to Nashville, and from Nashville to Chattanooga over the N., C. & St. L., 450.9 miles. The direct haul from Cincinnati to Chattanooga via the C., N. O. & T. P. is thus 114.9 miles shorter than the indirect haul via the L. & N. and the N., C. & St. L. by way of Louisville and Nashville. The average gross earnings, per mile, between Cincinnati and Chattanooga via the L. & N. and the N., C. & St. L. is $25,593.40.

In view of the finding of the Commission heretofore mentioned, it necessarily follows that its order ought to have followed its findings, unless the reasons stated by the Commission for not doing so are valid. In this connection it must be remembered, however, that the power to establish reasonable and just rates for the future for the transportation of freight by common carriers is vested by law in the Commission and no part thereof is vested in this Court, and this Court may not disturb the order complained of unless it can be clearly found that it conflicts with the provisions of the fifth

amendment to the Constitution of the United States, providing the power conferred has been regularly exercised. The order of the Commission itself does not fix a schedule of rates to be put in effect by the C., N. O. & T. P., but simply fixes a maximum rate beyond which the railroad may not go. The railroad, however, upon the making of this order established the schedule of rates as high as the order would permit, and therefore it may be truly said that the schedule of rates put in effect by the railway company is the schedule of rates made by the Commission or at least authorized by it. All that this Court could do if it found the maximum schedule fixed by the Commission violated the constitutional rights of shippers over the C., N. O. & T. P. would be to set aside the order; but as the rates prescribed thereby have already gone into effect, and as this Court has no authority or power to establish rates or to order that any particular rate be put in effect, it necessarily results that the rates now in effect on the C., N. O. & T. P. would continue in effect unless changed by the carrier or the Commission. The carrier could change its rates if the order was set aside and even make them higher than they are now. The Commission could again investigate the matter and fix a new schedule of rates. So that it appears that all the shippers would gain in this litigation would be the vacation of the order, and if the court held that the rates permitted were so high as to be violative in a constitutional sense of the rights of the shippers then

no doubt the Commission would not again establish such a high schedule of rates. But in any event if we should set aside the order on constitutional grounds the shippers would be obliged to go again to the Commission for relief. At first we were inclined to think that the result which would be obtained by a successful termination of this suit in behalf of the shippers would be so inconsequential as to render it unnecessary for this Court to take jurisdiction over the case, but upon further reflection it would seem that the shippers have the right to a judgment of this court as to whether or not the schedule of rates contained in the order complained of is so high as to be violative of the fifth amendment to the Constitution as to the difference between what the Commission found would be reasonable if they considered the C., N. O. & T. P. by itself and the maximum rates that were fixed. Then if the shippers again went before the Commission they would have the benefit of the judgment of this court upon that subject. And in that view we proceed to consider the question as to whether the reasons given by the Commission for not reducing the schedule of rates for the classes mentioned to the sums which the Commission found would be reasonable if the C., N. O. & T. P. should be considered by itself are valid.

It is claimed by the petitioners that the Commission, having found that the so-called 60-cent schedule would be reasonable for the C., N. O. & T. P. considered by itself, was bound to establish such

schedule as the result of its finding, and that the Commission's establishing a higher schedule for the reasons mentioned in its report, while seemingly within its power to fix a reasonable rate, was really and in fact beyond its power, as the Commission had no right to take into consideration in fixing a higher schedule the matters which induced it to make the order which it did.

There are two questions which are presented to this court for decision: First. Are the reasons given by the Commission for the establishment of the schedule mentioned in the order valid, or are they so outside and beyond the power of the Commission to fix a reasonable rate as to come within the rule that prohibits the Commission from fixing a rate for reasons which the Commission is not authorized to consider? (Southern Pacific Co. *v.* I. C. C., 219 U. S., 433.) Second. Is it shown, beyond reasonable question, by the present record that the schedule of rates contained in the order of the Commission complained of clearly violates the fifth amendment to the Constitution of the United States by taking the property of petitioners without due process of law or without just compensation if the taking is for a public purpose?

It seems to have been decided in the case of *Board of Railroad Commissioners of the State of Kansas* v. *Symms Grocery Co. et al.* (35 Pac., 217), that the shipper can not invoke these constitutional provisions for the reason that he is not obliged to ship; that he may utilize the rate prescribed or he may

not. We are not impressed with the soundness of this decision. The logical result of such a holding as applied to the facts in the present case would be equivalent to saying to the shipper, " You may pay an unconstitutional rate or go out of business "; and we do not think that the protection of the Constitution is held on any such condition.

In stating the reasons which in the judgment of the Commission compelled it to take into account in fixing the schedule of rates which it did other considerations and other railroads than the C., N. O. & T. P., we can do no better than to quote from the report of the Commission, as follows:

" The defendants also contend that these rates should be fixed not only with reference to the financial results and the financial necessities of the Cincinnati, New Orleans & Texas Pacific Co., but also with reference to other companies whose rates are necessarily affected by these; otherwise stated the Commission should establish rates which are just and reasonable for the section in which they prevail; if a particular company is so situated that it can make a handsome profit under such rates, that is the good fortune of that company just as it would be the misfortune of some other company if it could not show as favorable earnings.

" The rate from Cincinnati and Louisville to Chattanooga has been the same for the last 28 years. The distance is substantially the same, and this relation in rates will undoubtedly be maintained in

the future. Whatever reduction is made from Cincinnati will be met by corresponding reductions from other Ohio River crossings. Rates from Memphis to Chattanooga are lower by a fixed differential than from the Ohio River, and this relation would undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati.

"In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is frankly stated that the purpose is to obtain a general reduction to this southeastern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio River to Atlanta without any corresponding reductions to Chattanooga. Originally, the same rate had been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the distance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the proper basis, and that the

reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time, for the following reasons:

"The reductions of 1905 grew out of the claim upon the part of Atlanta that its rates from the north were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery and the difference between Atlanta and Birmingham reduced.

"The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis & San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is 50 miles shorter. If, now, this rate from Cincinnati to Chattanooga is reduced, that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a reopening of that contest.

"It must also be remembered that any reduction from the north to Atlanta and corresponding terri-

tory would undoubtedly be followed by similar reductions from the east as was the case in 1905.

"It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory. How far are we at liberty to consider all this in fixing a reasonable rate over the Cincinnati, New Orleans & Texas Pacific? It should be noted that Chattanooga is not complaining of unfair treatment as compared with other southern points.

"Some indignation was expressed by several witnesses upon the part of the city of Cincinnati because after that community had expended this enormous amount of money in the construction of the Cincinnati Southern Railroad, that property was not more devoted to the interests of the city of Cincinnati. If that city, under proper legislative authority, had seen fit to operate its railroad, it might have established to Chattanooga whatever rates it saw fit, and if the results of municipal operation had been as favorable as the present, it could have materially reduced those rates and still obtained a fair return upon its investment. Such a reduction would have cheapened the cost of this freight to the dealer and probably in a degree to the consumer, and so might have benefited the ultimate consuming public. It is doubtful if it would have

benefited the interests of Cincinnati, since the rates established by it would have been met by carriers serving rival communities, and the relation of rates would have continued the same. However this may be, the city has parted with its right to operate this property, and the matter stands exactly as though this road had been built by private capital.

"In the Matter of Proposed Advances in Freight Rates (9 I. C. C. Rep., 382) the Commission, having under consideration the rates on grain from Chicago to the Atlantic seaboard, announced that the interests of all competing lines must be considered in determining the reasonableness of those rates, and not merely that line which could handle the business the cheapest. In the *Spokane case* (15 I. C. C. Rep., 376) the same subject was considered and the same conclusion reached. The last affirmance of this doctrine is found in *Kindel* v. *N. Y., N. H. & H. R. R. Co.* (15 I. C. C. Rep., 555), in which the rule is stated by Clark, Commissioner, as follows:

"'In the *Spokane case* (15 I. C. C. Rep., 376) we held that the reasonableness of a rate between two points, served by two or more carriers, could not be determined by consideration alone of that line which is shortest and most favorably situated as to operation, earnings, etc., but that the entire situation must be considered. * * *

"'As before suggested, we can not, in determining competitive rates, select that railroad which is the shortest or most advantageously situated and

limit the rate to what would allow that property fair earnings. We must consider the entire situation and determine a reasonable rate not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado points by reasonably direct lines.'

" We have no doubt as to the correctness of this principle and believe it must be applied here within proper limits.

" The Cincinnati Southern Railroad is a single trunk line without branches, running from Cincinnati to Chattanooga. The main line of the Louisville & Nashville extends from Cincinnati to Louisville, and from Louisville to Nashville. Traffic from Louisville to Chattanooga passes through Nashville, and over the Nashville, Chattanooga & St. Louis to Chattanooga. For the year 1907 the gross earnings per mile of the Cincinnati Southern were, as already stated, over $26,000 per mile, those of the Louisville & Nashville about $11,000 per mile, and of the Nashville, Chattanooga & St. Louis less than $10,000 per mile. The same year the earnings of that portion of the line of the Louisville & Nashville between Cincinnati and Louisville were $25,000 per mile; between Louisville and Nashville $30,000 per mile; those of the Nashville, Chattanooga & St. Louis between Hickman and Chattanooga, a distance of 320 miles, over $20,000 per mile. Now, in adjusting the rates of the Louisville & Nashville, or the Nashville, Chattanooga & St. Louis, shall the Commission consider each section

of the road by itself, or shall it establish a common rate for the whole?

" Commission rates are usually the same for all lines, both main line and branches. It is fair that the main line should in a degree contribute to the support of the branch line, for the branch-line business when it reaches the main line is surplus traffic, from which a larger profit is made. It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves. It hardly seems proper to fix the rates upon the Cincinnati Southern, which is really a main line, without any reference to the branch lines which contribute to it.

" This should be further borne in mind. Of the entire traffic handled by the Cincinnati, New Orleans & Texas Pacific in the year 1907 over two-thirds of the tonnage was delivered to it by its connections and most of it hauled as a through transaction from Cincinnati to Chattanooga or the reverse. Comparatively little traffic originates upon this railroad between these two termini. The present large earnings may be due to the fact that the Southern Railway is able to turn onto this road large amounts of traffic which it would exchange with some other railroad but for its interest in the Cincinnati Southern. If the city of Cincinnati were operating this property itself, it is by no means certain that the apparently undue profits of to-day might not be a deficit.

" The complainants urge that the Cincinnati Southern is really a part of the Southern Railway system. If it were so considered the gross earnings per mile of the entire system would be less than those of either the Louisville & Nashville or the Nashville, Chattanooga & St. Louis.

" If these rates are to be established with reference to other rates in the vicinity it becomes pertinent to inquire how the present rates compare with other rates for similar distances in the South. Extensive tables have been furnished by the defendants instituting such comparisons, and these tables have been to some extent criticized and replied to by the complainants.

" It fairly appears that the rates now in effect from Cincinnati to Chattanooga upon the numbered classes are lower than similar rates prescribed by the railroad commissions of most States in the South. They are as low and usually lower than the interstate rates made by southern roads for similar distances.

" The complainants call our attention to rates from Cincinnati to Nashville. The distance is 300 miles and the rates are materially lower than those from Cincinnati to Chattanooga, being, first class, 53 cents as against 76 cents, and sixth class, 23 cents as against 30 cents. But this Commission has found (*Chamber of Commerce of Chattanooga* v. *Southern Ry. Co.*, 10 I. C. C. Rep., 111), and the Federal courts have found (*East Tenn., Va. & Ga.*

Ry. Co. v. *I. C. C.*, 181 U. S. 1), that water competition influences these rates to Nashville. The rate from Cincinnati to an intermediate point where there is no water competition is higher in proportion to distance than those to Chattanooga. Thus the first-class rate from Cincinnati to Gallatin, 20 miles north of Nashville, is 78 cents.

" The complainant also refers to rates from Virginia cities to Atlanta which are less per ton-mile than those in question. But it is well understood that these rates are materially affected by water competition, and ordinarily the long-distance rate should be less per ton-mile than the rate for the shorter distance. If rates from Virginia cities south for distances of from 300 to 350 miles are examined, it will be found that they usually equal or exceed the Chattanooga rates.

" The complainants urge that the volume of traffic in this territory has increased and is increasing, all of which should make for lower rates; and this is certainly true; but it must also be borne in mind that the cost of operation is advancing. In the past railways have been able to introduce various economies in the handling of their business, which have tended to offset the added cost of labor and supplies, so that the net result has been that the increase in the cost of transporting a ton of freight 1 mile has but slightly, if at all, increased. It is doubtful if in future similar economies can keep pace with advancing prices.

"We hesitate at this time to make widespread and far-reaching reductions in rates where there is no special occasion for it and where the rates themselves are not clearly excessive."

It appears from the findings of the Commission that it has always refused in the consideration of the reasonableness of a rate or rates to consider only the particular carrier making the same by itself, but on the contrary has always considered the rates in a particular territory or the rates of other carriers to be affected by the change of the particular rate or rates in question; and we think it fair to say that so far as the Commission is concerned there has been a uniform policy, public policy if you please, because the Commission represents the United States in so far as it acts within the scope of its delegated authority in the establishment of reasonable and just rates, to the effect that it will not fix rates or determine their reasonableness solely upon a consideration of the particular carrier whose rates are directly involved. We think this court may take judicial knowledge of the fact that the interstate rates prescribed for the transportation of freight by common carriers must necessarily be more or less interdependent, or at least be so related to each other that the rate-making power will not, simply because it has the power, fix a rate upon a single line of railroads which will necessarily disorganize established and reasonable rates on other railroads in the same territory. All rates established in accordance with law are presumed to be

just and reasonable. It is for this reason that the rates for the transportation of freight of other carriers in the same territory may be looked into as evidence of what should be a just and reasonable rate, providing conditions are similar. We can not as a court not vested with the power to fix rates say, beyond question, that the elements which the Commission took into consideration in fixing the schedule complained of were improper for the Commission to consider, and therefore can not conclude that the Commission based a schedule of rates upon improper grounds.

It was said by the Supreme Court in *Texas & Pacific Railway* v. *I. C. C.* (162 U. S., 233)—

"that the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations: that, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers * * *."

Under the second proposition we can not disturb the order of the Commission on the theory that it

fixed rates so high as to be violative of the fifth amendment to the Constitution, unless it shall clearly appear to us that the constitutional rights of the shippers were invaded thereby. The fixing of the schedule of rates complained of was a legislative act.

Munn v. *Illinois,* 96 U. S., 113.
Peil v. *Chicago N. W. Ry. Co.,* 94 U. S., 164.
Express Cases, 117 U. S., 1.
C. M., etc., Ry. v. *Minnesota,* 134 U. S., 418.
Reagan v. *Farmers' Loan & T. Co.,* 154 U. S., 362.
St. L. & S. F. Ry. Co. v. *Gill,* 156 U. S., 649.
C., N. O. & T. P. Ry. Co. v. *I. C. C.,* 162 U. S., 184.
T. & P. Ry. v. *I. C. C.,* 162 U. S., 197.
I. C. C. v. *Cincinnati Ry. Co.,* 167 U. S., 479.
Railroad Commission Cases, 116 U. S., 307.
Smyth v. *Ames,* 169 U. S., 515.
Chord v. *L. & N. R. R. Co.,* 183 U. S., 483.
Alpers v. *City of San Francisco,* 32 Fed., 503.
So. Pac. Co. v. *R. R. Commissioners,* 78 Fed., 236.
New Orleans Water Works Co. v. *New Orleans,* 164 U. S., 471.
Atlantic Coast Line v. *North Carolina Corporation Com.,* 206 U. S., 1.

And while we are of the opinion that our power to review the order of the Commission fixing a schedule of rates is co-extensive with the limits of the protecting shield of the Constitution, still it must clearly appear that such protection in some degree has been taken away. The Commission

found that the rates complained of were not clearly excessive. Much less are we able to find that the rates authorized by the Commission in the order complained of and which were a reduction of the former rates are clearly excessive. In making this statement we are fully aware of the allegation of the bill as to the net earnings of the C., N. O. & T. P., and the whole case as to the excessive feature of the rates fixed by the Commission is almost entirely based upon the earnings of the C., N. O. & T. P. While earnings may be considered in the fixing of a reasonable rate to be charged by a carrier for the transportation of freight, rates necessarily can not be based upon earnings alone. This is made clearly to appear when we consider that a just and reasonable rate is one which is just to the carrier and to the shipper. It is a rate which yields to the carrier a fair return upon the value of the property employed in the public service and it is a rate which is fair to the shipper for the service rendered; and when this rate is established if it results in large profits to the carrier the carrier is fortunate in its business, and if it results in a loss of earning power so that the business of the carrier is unprofitable the carrier is unfortunate. But the rate may not be lowered or raised merely upon the ground that the carrier is either making or losing money, providing always the rate is a reasonable and just rate. Indeed, it has been held that the earning power of the rate is one of the least

considerations in fixing a just and reasonable rate.

Canada Northern R. R. Co. v. *International Bridge Co.*, L. R. 8 App. Cases, 723.

Board of Railroad Comm. v. *I. C. R. R. Co.*, 20 I. C. C. Rep., 181.

Being satisfied that the Commission did not err in taking into consideration the grounds they did in fixing their schedule of rates, and not being clearly satisfied that the rates themselves are so high as to violate the constitutional rights of the shippers, we are of the opinion that the bill must be dismissed. And it is so ordered.

ARCHBALD, *Judge*, dissenting:

There can be no serious question as to the conclusion which would have been reached by the Commission had they confined themselves to the determination of what was a just and reasonable rate from Cincinnati to Chattanooga by the Cincinnati Southern, without regard to the effect upon other roads. This was gone into at length in 1894, and the 60-cent schedule, which is now contended for, sustained. (*Freight Bureau* v. *Cin., N. O. & T. P. R. R.*, 6 Inter. Com. Com. Rep., 195.) But as the law then stood there was no authority in the Commission to fix future rates, and its action was therefore held of no effect. (*Inter. Com. Com.* v. *Cin., N. O. & T. P. R. R.*, 167 U. S., 479.) But even with the lapse of time and the change of conditions, the issue as is recognized by the Commission is the same, and the same conclusion would confessedly

have been reached except as they were influenced by a regard for the necessities of other roads. "If it is our duty," says Commissioner Prouty in the report, "to take this railroad by itself and to determine the reasonableness of these rates, by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case, and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission." Unfortunately, however, for the complainants this view did not prevail. It was contended by the railroad company that the rates should be fixed not only with reference to the final results to itself and its own financial necessities, but also with reference to other companies, whose rates were necessarily affected thereby; or, in other words, that the Commission should establish rates which would be just and reasonable for the whole section of territory in issue, and that if a particular carrier was so situated that it could make a handsome profit, it was to be recognized as a piece of good fortune with which the Commission was not to interfere. Adopting this view, which had also been followed in other cases (in re proposed advance in freight rates, 9 Inter. Com. Com. Rep., 382; *Spokane* v. *North Pac. R. R.*, 15 Inter Com. Com. Rep., 376; *Kindel* v. *New York, New Haven & Hartford R. R.*, 15 Inter. Com. Com. Rep., 555), it was accordingly held that the reasonableness of the rate between points served by two or more lines

could not be determined by reference to that line alone which was shortest and most favorably situated with respect to operation and earnings, and the rate limited thereby; but that the entire situation was to be considered, and a rate fixed which would be reasonable with respect to all the lines directly serving the points involved. That rates for similar distances on other lines similarly conditioned may be referred to, to assist in determining what is fair and reasonable in any case, is clear. And it is no doubt proper also to take into account the effect on rates upon freight moving to and from other points beyond those immediately in view. But that, in my judgment, is as far as it is permitted to go. There is no right, as I look at it, to consider the effect of the rate or rates to be established on those of other roads, between the same points, or to maintain such rates at a figure which is necessary to meet the needs of those roads. And so far as the order of the Commission was induced by any such idea, it can not be sustained.

If the Cincinnati Southern was the only line from Cincinnati to Chattanooga, the rate, of course, so far as it was not a joint rate, would be fixed with reference to that road alone. And if it was a line that was costly to build, or that could not be economically run, this would operate to increase the rates, and the shipper would have to pay, to correspond. But, on the other hand, if the reverse of this was true, and the road was neither an expensive one to construct, maintain, or run, the shipper

would clearly be entitled to the benefit of these conditions and to the lower rates necessarily to ensue. So, also, if this favored road was the first in the field, and other roads had come in after it was built, it certainly would not be contended that with the introduction of new and additional facilities the lower rates prevailing on the more favored line could be raised to meet the necessities of others not so well placed. It is not to be thought of that the construction of a second or third road should be made the basis for higher rates. The standard would be that of the original and most favored line. But what difference does it make whether the road which can afford the best rate is the first or the last to be built? It is the condition at the time the rate is fixed that controls. The shipper is entitled to the benefit of any advance in transportation facilities that may be made and is not to be tied down to the unprogressive and outdistanced past. The supposed advantage in competing lines between the same points becomes a detriment, if rates are to be kept up to help the weakest road.

The Cincinnati Southern extends in a short and direct route due south from Cincinnati to Chattanooga without branches 336 miles. It was expensive to build, and the cost of operation and maintenance is high. But its net earnings are nevertheless large, amounting to some 44 per cent on the capital stock. The route between the same points by way of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis roads is a third longer, or

450 miles, and both of these roads have more or less unremunerative branch lines. And yet the Commission have not only put the two routes on an equality, but have even considered the influence of unprofitable branches, which have to be taken care of, fixing a rate which shall be fair for the whole system, and not simply for the immediate section of road which is involved. This, in my judgment, they had no right to do. The shipper is entitled to a just and reasonable rate, having regard to the service which is to be rendered by the carrier that is to perform. And this service is largely to be measured by the facilities for economically rendering it, which are possessed by that particular road. It is not to be augmented or kept up, beyond what is fair and just, by the consideration of what some other road, not so favorably situated, may need.

The order of the Commission, being based upon mistaken and erroneous grounds, is therefore invalid and should be so declared. (*Southern Railway* v. *St. Louis Hay & Grain Co.*, 214 U. S., 297; *Inter. Com. Com.* v. *Stickney*, 215 U. S., 98; *Southern Pacific Railway* v. *Inter. Com. Com.*, 219 U. S., 833.) And the case should be thereupon remanded to the Commission in order that a rate may be fixed which shall be just and reasonable as respects the respondent carrier, by whom the services are to be performed. This does not take from the Commission the right to say what that rate shall be. Much less does it involve the determination of the rate

by the Court. It merely disposes of the rate which has been mistakenly made, as preliminary to a new consideration of it by the Commission upon correct and proper grounds. (*Cin., N. O. & T. P. R. R.* v. *Inter. Com. Com.*, 162 U. S., 184, 238, 239; *Southern Railway* v. *St. Louis Hay & Grain Co.*, 214 U. S., 297.)

I therefore dissent from the judgment of the court, sustaining the demurrer and dismissing the bill.

MACK, *Judge:*

I concur in the above dissent.

United States Commerce Court.

No. 6.—MAY SESSION, 1911.

THE EAGLE WHITE LEAD CO. ET AL., PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION, AND THE CINCINNATI. NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., respondents.

UNITED STATES, INTERVENING RESPONDENT.

Mr. Francis B. James, for the petitioners.

Mr. James A. Fowler, Assistant to the Attorney General, and *Mr. Blackburn Esterline,* special assistant to the Attorney General, for the United States.

Mr. P. J. Farrell, for the Interstate Commerce Commission.

Mr. Frank W. Gwathmey and *Mr. R. Walton Moore,* with whom *Mr. Edward Colston* was on the brief, for the respondent carrier.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[July 20, 1911.]

CARLAND, *Judge:*

The bill in this case is, for all practical purposes, the same as the bill in case No. 5, *Receivers and*

Shippers' Association of Cincinnati v. *Interstate Commerce Commission and the Cincinnati, New Orleans & Texas Pacific Railway Co.*, and was filed for the same purpose. The cases were submitted together upon bill and demurrer.

For the reasons stated in the opinion filed in case No. 5, the demurrer in this case must be sustained and the bill dismissed.

ARCHBALD and MACK, *Judges*, dissenting.

United States Commerce Court.

No. 7.—April Session, 1911.

Atchison, Topeka & Santa Fe Railway Company et al., petitioners,

v.

Interstate Commerce Commission, respondent, The United States and Arlington Heights Fruit Company et al., interveners.

For opinion and order of the Interstate Commerce Commission see 19 I. C. C. Rep., 148.

Mr. Robert Dunlap, *Mr. C. W. Durbrow*, and *Mr. H. A. Scandrett*, with whom *Mr. Gardiner Lathrop* and *Mr. T. J. Norton* were on the brief, for the petitioners.

Mr. Blackburn Esterline, special assistant to the Attorney General, with whom *Mr. James A. Fowler*, Assistant Attorney General, was on the brief, for the United States of America.

Mr. William E. Lamb for the Interstate Commerce Commission.

Mr. Asa F. Call for the interveners.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[October 5, 1911.]

MACK, *Judge:*

The complaint made to the Interstate Commerce Commission by shippers that the carload rate of $1.15 per hundred pounds for oranges and lemons from California and other western points to the East prescribed by the railroads was unreasonably high, was dismissed by the commission as to oranges, but sustained as to lemons. These rates are so-called "blanket rates," covering transportation to practically the entire territory east of the Rocky Mountains, including New England. The rate for oranges had originally been $1.25 per hundred, but had been voluntarily reduced by the railroads in 1907 to $1.15, the present rate; while the rate for lemons from 1902 on had fluctuated between $1.25 and $1 per hundred, having been several times reduced to the latter figure and again advanced to the former; except for a brief interval, it was allowed to stand at $1 per hundred from January, 1904, to November, 1909, when it was advanced to $1.15, the same as on oranges. This is the rate now complained of. By the action of the commission the $1.15 rate on oranges was left undisturbed, but the rate on lemons was reduced to $1, the rate so fixed being conditioned on the same requirements with regard to minimum weights that had theretofore prevailed, and being extended without change to the same territory blanketed. So much of the complaint as had reference to the additional precooling and refrigerating charges

was held by the commission for further advisement and is not included in this proceeding. This case to enjoin the enforcement of the order prescribing the $1 lemon rate, was begun by bill filed in the Circuit Court of the United States for the District of Kansas. It was subsequently transferred to this court, and is now up for final disposition on the bill, answers, and testimony taken.

The first and decisive ground of attack is that the order "is without the scope of the delegated authority under which it purports to have been made" (*I. C. C.* v. *Ill. Centr. R. R. Co.*, 215 U. S., 452, at 470) in this, that while in form holding the $1.15 rate unreasonable and prescribing the $1 rate as reasonable, in substance the commission did not determine the intrinsic reasonableness of either rate, but reduced the rate prescribed by the railroads in order that, and to a point at which, in its judgment, the California growers might successfully compete with their Sicilian competitors in a broader market than would otherwise be possible; in other words, that the commission acted upon the erroneous assumption that it had the power and the right, if not the duty, so to adjust railroad rates as would give to the American industry protection against foreign competition.

If complainants are right in their contention, the invalidity of the order necessarily follows. This has been clearly established by the decision rendered since the order herein was made in *Southern Pacific Co.* v. *Interstate Commerce Commission* (219 U. S.,

433) reversing the decree of the Circuit Court and annulling an order of the commission, which had reduced a $5 lumber rate advanced from $3.10, the rate in force for over 10 years, to $3.40 and $3.65, respectively.

Chief Justice White, voicing the unanimous opinion of the Supreme Court, thus enunciated the principles which it is urged are controlling in the present case:

> "The contention is that although the order made by the commission may have been couched in form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the commission was not the exercise of such an authority, but based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power. Applying these propositions, the insistence is that both in form and in substance the order of the commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is

to say, the contention is that the order entered by the commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the commission was satisfied that it was a wise policy to do so, or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for services rendered. On the other hand, the commission in the argument at bar does not contend that it possessed the indeed abnormal and extraordinary power which the railroads thus say was exerted. * * * While it is not denied on behalf of the commission that that body may have considered the prior rate prevailing in the Willamette Valley, the period during which it had been in force, and the effect upon the business situation in the valley of a change to a higher charge, all these things, it is insisted, were not made the basis of the power exerted, but were simply taken into consideration as some of the elements proper to be considered in the ultimate exertion of the lawful power to forbid an unjust and unreasonable rate and fix a reasonable one.

It is clear, therefore, as we have said at the outset, that the result of the contentions

and concessions of the respective parties is to reduce the controversy to a single issue, which is, What was the nature and character of the order made by the commission? That is, What, in substance, was the power which the commission exerted in making the order?

Coming to the consideration of that subject, we are of the opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests.

After reviewing some of the testimony taken before the commission and its report, he concluded as follows:

"While it is true that the opinion of the commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it deemed would arise from a change of the

> rate, even if that change was from an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the services rendered for the future."

As early as 1896, when the commission had no power to prescribe future rates, the Supreme Court said in *T. & P. Ry. Co.* v. *I. C. C.* (162 U. S., 197), at page 221:

> "Our reading of the act does not disclose any purpose or intention on the part of Congress to thereby reenforce the provisions of the tariff laws. These laws differ wholly in their objects from the law to regulate commerce. Their main purpose is to collect revenues with which to meet the expenditures of the Government, and those of their provisions whereby Congress seeks to so adjust rates as to protect American manufacturers and producers from competition by foreign low-priced labor operate equally in all parts of the country."

Whatever, therefore, the rights of the carriers may be to give reduced rates for the purpose of fostering a new or an established industry or for granting to it a higher measure of protection against foreign competition than Congress, through the revenue laws, has given it, no such power can lawfully be exercised by the commission.

The authority granted it under section 15 of the act to regulate commerce, to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable, does not con-

fer absolute or arbitrary power to act on any considerations which the commission may deem best for the public, the shipper, and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely.

An examination of the report of the commission, reproduced so far as it bears on the lemon rate, in its entirety [1] demonstrates that except for two brief

[1] "The world's supply of lemons is mainly produced in two localities, Sicily and southern California. In the year 1909 Sicily shipped 69,000 carloads, southern California 6,000 carloads. The United States consumed approximately 12,000 carloads, of which one-half were of foreign growth.

The cost of producing lemons in Sicily is much less than in California. Labor enters largely into the cost of production. The laborer in the Sicilian grove receives from 40 to 60 cents per day, while in California he is paid from $1.75 to $2 per day, and the difference in wage is even greater in case of the laborer employed about the packing houses.

A box of lemons weighs 84 pounds. To transport that box from the Sicilian grove to the dock in New York costs from 30 to 35 cents. From New York to Chicago the rate is now 40 cents per hundred pounds, or 33.6 cents per box, and this is substantially the rate which has prevailed in the past. In 1901 the rate from California to all eastern points was $1.25 per 100 pounds, or $1.05 per box. It will be seen, therefore, that both in cost of production and in cost of transportation the Sicilian grower had a great advantage in all territory east of the Missouri River, which was the main consuming territory of the United States. A protective duty of $1 per 100 pounds had been fixed upon the Sicilian lemon, but even with that assistance the American grower was unable to successfully compete. In the years 1901 and 1902 California supplied but about one-fifth of the demand in the United States.

The growers in California applied to the carriers for a rate of transportation which would enable them to meet the Sicilian lemon in eastern markets. They asked for a rate of $1 to the Middle West and of 75 cents to the Atlantic seaboard, the rate then being $1.25 to all this territory. The carriers con

paragraphs suggesting grounds for lowering the lemon while maintaining the orange rate, it deals entirely with matters tending to show the need in this industry of a high-protective tariff against Sicily and, not on traffic considerations, but to compensate for the tariff insufficiencies, a low transportation rate especially to eastern territory.

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ceded in the winter of 1902 what was termed a "relief" rate of $1 per 100 pounds to all territory, and that rate was renewed in the winter of 1903.

In 1903 the general freight agent of the Santa Fe lines upon the Pacific coast wrote to his superior traffic officer upon this subject as follows:

"There is no doubt in my mind that if the California lemon growers do not see more encouragement in the future they are going to—a good many of them—let their orchards go back.

"It seems to me that we will have to make the rate $1 per 100 pounds apply all the year, and give the lemon growers to understand that we will continue it in effect until they secure United States markets. * * * I think we can defend the lower rate on lemons on account of the competition of foreign lemons. * * * It is up to us now to give the lemon grower a definite answer as to what he may expect for years to come."

In fact in 1904 the $1 rate was made applicable for the entire year, and was continued in effect until November and December, 1909, when tariffs were filed advancing the rate to $1.15.

The testimony in this case indicates and fairly shows that the cost of placing lemons upon the cars in California is no less, but is rather greater to-day than in 1904. The lemon growers assert that the increase in their production has been due mainly to the lower rate of freight under which they were better able to meet Sicilian competition.

But even with the $1 rate California has been unable to compete with Sicily upon the Atlantic seaboard. The average price received by California growers east of the Allegheny Mountains is $1 per box less than the price obtained west of the Missouri River.

The last tariff act increased the duty on lemons from $1 to $1.50 per 100 pounds. The complainants assert and the defendants deny that this was the occasion for the increase in the freight rate.

The average cost to the defendant of handling lemons is somewhat less than with oranges, for the reason that the average haul is shorter. As just noted, few lemons from California find a market upon the Atlantic seaboard, while practically the entire supply in territory west of the Missouri River is from that source. Oranges, upon the other hand, move in large quantities to these far eastern markets. The complainants insisted that the average haul in case of oranges was 500 miles greater than in case of lemons, and manifestly it is considerably in excess.

The expense of moving citrus fruit under refrigeration is greater than under ventilation, since the weight of the ice is added to the load of the car, and the proportion of oranges moving under refrigeration is greater than of lemons.

Upon the other hand, oranges load somewhat heavier than lemons, the present minimum being 27,600 pounds in case of oranges and 27,200 pounds in case of lemons.

Upon full consideration we are of the opinion that the present lemon rate of $1.15 is unreasonable, and that the rate ought not to exceed $1 per 100 pounds, with the present minimum weight, said rate to apply to all territory to which the rate of $1.15 is made applicable by the tariff of the defendants on file.

The only transportation considerations stated by the commission as a justification for their order reducing the lemon, while refusing to reduce the orange, rate from $1.15 to $1 are: First, that the average length of haul, and therefore the average cost, is less for lemons than for oranges; and, second, that lemons are ordinarily carried under ventilation, while oranges are ordinarily carried under the more expensive refrigeration. As an offset, in part at least, the minimum carload weight prescribed for oranges is, as stated, higher than for lemons.

Inasmuch, however, as any additional cost due to refrigeration is the subject of a special refrigeration charge, it is obvious that this can not be considered as an element in the transportation rate.

While the difference of less than 500 miles in the length of the average haul of lemons and oranges is a fair transportation factor to be considered in prescribing blanket rates for both products, it is apparent from the report that this was but a small, if not an entirely insignificant factor in this case, especially as the increase of 50 per cent in the protective tariff on lemons was expected by all the parties to widen the market for the California lemon growers and thus to increase the average length of the lemon haul.

As in our judgment the order is based primarily on the assumed authority to protect the industry against foreign competition, it must be held void as beyond the powers delegated to the commission. This conclusion renders it unnecessary to deter-

mine whether, under the evidence, the rate of $1 is confiscatory, or whether the commission is empowered to prescribe blanket rates either generally or subject to the limitation that the rate between the most distant points must be at least nonconfiscatory.

A permanent injunction will be granted restraining the enforcement of the order as to the rate on lemons, without prejudice to a reopening and reconsideration by the commission of the original proceedings before it or of any further complaint in respect to the $1.15 rate, now disposed of.

United States Commerce Court.

No. 9.—May Session, 1911.

THE PROCTER & GAMBLE CO., PETITIONERS,

v.

UNITED STATES ET AL., RESPONDENTS.

INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT.

ON FINAL HEARING.

For opinion of Interstate Commerce Commission, see 19 Inter. Com. Com. Rep., 556.

Mr. George H. Warrington, for the petitioner.

Mr. James A. Fowler, Assistant to the Attorney General, and *Mr. Blackburn Esterline,* special assistant to the Attorney General, for the United States.

Mr. P. J. Farrell, for the Interstate Commerce Commission.

Mr. Edward Barton, with whom *Mr. M. R. Waite* was on the brief, and *Mr. R. Walton Moore,* for the respondent carriers.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[July 20, 1911.]

ARCHBALD, *Judge:*

The Procter & Gamble Co., the petitioner, is engaged in the manufacture of soap, and the refining of cottonseed and other oils, and owns large industrial establishments at Ivorydale, Ohio, Port Ivory, N. Y., and Kansas City, Kans. In all its plants it has and maintains private railroad tracks, for the purpose of receiving cars from the interchange tracks which connect it with the respondent railroads. At two of the places named it owns and employs its own locomotives and itself performs the entire switching of cars, and at the other, the switching is performed by the railroads under contract, which is paid for separate and apart from the transportation charges. In every instance the tracks are owned by the company, are on its own land, and the railroads have no interest or control over them.

The Procter & Gamble Co. is also the owner of 532 oil-tank cars, which it has purchased at a cost of about $500,000. These cars are necessary for the transportation of the oils, grease, and other like commodities used by the company in its business, and were purchased by it in relief of the railroads, which were and are not prepared to furnish them. These tank cars, when loaded by the petitioner at its several establishments, are tendered to the con-

necting railroads for shipment, and are hauled to their various destinations at the regular published rates for the respective commodities with which they are loaded. The use of these cars is confined to the petitioner's business, and in consideration of the petitioner's furnishing them an allowance is made by the railroads of three-quarters of a cent a mile per car for each mile that it is hauled, this allowance being in accordance with the published tariffs of the railroads with respect to the movement of all private tank cars.

Until the adoption of the rule set forth below, no demurrage was ever charged by any of the respondent railroads for delay in unloading private tank cars while standing on the private tracks of the owner. But beginning in February, 1910, and following that, the railroads have published, as part of their so-called "uniform demurrage code," the following rule, which is the subject of this controversy:

"Private cars while in railroad service, whether on the carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

"Empty private cars are in railroad service from the time they are placed by the carrier for loading, or tendered for loading on the orders of the shipper.

"Private cars under lading are in railroad service until the lading is removed and the cars are regularly released.

"Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed."

The demurrage rules, of which this is a part, were prepared by a committee of the National Association of Railway Commissioners, composed of a representative from each State having a railroad commission and a member of the Interstate Commerce Commission; and were adopted by the association in convention and later approved, although not prescribed, by the Interstate Commerce Commission.

After the publication of the rule in controversy, but before it had gone into effect, the Procter & Gamble Co. made complaint to the Interstate Commerce Commission, and sought to have the rule set aside, in so far as it permitted the railroads to make a demurrage charge against the private cars of the company after they had been delivered to it and were standing on its own private tracks. But after a due hearing the Commission dismissed the complaint, and the respondent railroads are now exacting demurrage charges in accordance with the provisions of the rule.

The proceedings in this court are brought to set aside the order of the Commission dismissing the complaint and refusing relief, the allegation being made that the rule, in so far as it provides that privately owned cars under lading on private tracks are in railroad service, and so subject to a demurrage charge until the lading is removed, is unjust and unreasonable and deprives the company of the right to use its private cars on its private tracks for its own purposes unless demurrage is paid therefor, thereby permitting the respondent railroads to deprive the company of its property without due process of law, in violation of the fifth amendment to the Constitution and the acts regulating interstate commerce. The prayer of the petition is that the order of the Commission dismissing the complaint may be annulled and the respondent railroads enjoined from collecting the demurrage charge, and that they may be further required to repay to the petitioner the sums which they have wrongfully collected from it under the rule.

The United States moves to dismiss the petition on the ground that this court has no jurisdiction in the premises; or that, if it has, no cause of action is made out which entitles the petitioner to relief. And in this motion the Interstate Commerce Commission and the several railroads which have been summoned as respondents, join.

The jurisdiction of this court is denied on the ground that the petitioner is a shipper, and the Interstate Commerce Commission having merely dis-

missed the complaint which was made to it, and granted no affirmative relief, that there is nothing in the order of dismissal which it entered that affords any basis for action here. Or, in other words, that it is only the carrier against which an order is made in favor of the shipper that can bring the case for review into this court, the shipper being concluded by the action of the commission, whatever it may chance to be. This is a serious question, which merits careful consideration and is not altogether easy to solve.

By the act by which the Commerce Court was created (act June 18, 1910; 36 Stat., 539), it was given "the jurisdiction now possessed by circuit courts of the United States and the judges thereof" of, inter alia, "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." It was also therein further provided that "in all cases within its jurisdiction the Commerce Court and each of the judges assigned thereto shall respectively have and may exercise any and all the powers of a circuit court of the United States, and of the judges of said court respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred;" and, conversely, that nothing in the act should be construed as enlarging the jurisdiction at the time possessed by said circuit courts, or the judges thereof, thereby transferred to and vested in the Commerce Court; the jurisdiction, however, so far as conferred, to be

exclusive, and so far as not conferred being reserved. The question, then, is whether upon any recognized ground of equity practice the present petitioner, under the law as it previously stood, would have had the right to apply by bill to a circuit court of the United States to set aside the action of the Interstate Commerce Commission dismissing its complaint, and to enjoin the enforcement by the railroads of the demurrage charge which in effect was thereby approved.

It is of no significance in this connection, nor of any assistance in the solution of the question, that suits in this court to enjoin, set aside, annul, or suspend any order of the Commission are required to be brought against the United States. It is just as consistent that the United States should be the respondent in cases brought for this purpose by the shipper as in cases brought by the carrier, the Government in each case standing for the order of the commission which it is thus appointed to justify and defend.

Neither does it detract from the jurisdiction of this court that, under the law as it previously stood, the venue of suits brought in the circuit courts of the United States against the Commission to set aside its orders was fixed in each case in the district where the carrier against which the order was made had its principal operating office, jurisdiction to hear and determine such suits being in terms vested in the courts of such district. (Act June 29, 1906, sec. 16, 34 Stat., 592.) This was a favor to the carrier

adversely affected by the order. And according to the law at the time, the commission being the respondent, provision had to be made for jurisdiction over it by the courts of the various districts throughout the country where it was liable to be summoned. It was to meet this situation that jurisdiction was given in terms over suits of the character mentioned to the courts of the district where the carrier against which the order was made had its principal office. Nothing more was intended, and nothing more is to be made out of this provision of the law. Certainly nothing adverse to possible suits by others than the carrier is to be thereby implied.

The real argument against the right of suit, where the complaint of a shipper has been dismissed, is that the denial of relief by the commission is not an order of which the courts can lay hold. Such an order, it is urged, must be one specifically requiring that something shall or shall not be done before this is the case. In *Peavey* v. *Union Pacific Railroad* (176 Fed., 409) it is said:

"A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the commission, to those who were parties to the proceedings before it, upon which the order was based. The proceeding in court is not an appeal; it is a plenary suit in equity. * * * The determination of the question, what parties may maintain such suits is left by the * * * act to the general rules and practice in equity, and under

them any party whose rights or property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a Federal court of equity for relief."

But there was an order of the Commission in that case which prohibited the railroads from paying to complainants, and others who were owners of elevators located upon their lines, any compensation for the elevation of grain in transit, so that the law was unquestionably met so far as there being an order is concerned; and the case therefore decided nothing more than that the right to resort to the courts is not confined to the carrier, but extends to everyone injuriously affected by the order of the Commission, even though not a party to the proceedings before it in which the order was made. To that extent, but no further, it is pertinent here. Putting aside, however, for the moment the provisions of the statute, and considering the case as though it had not been passed, it is clear that a shipper would have been entitled, in one form or another, to redress in court against an unjust and unlawful charge or practice imposed by a carrier, such as the one here is alleged to be. And it would have been permissible therefore for the Procter & Gamble Co., denying the right of the carrier to make this demurrage charge, to have refused to pay it and compel the carriers to bring suit therefor; or, in view of the complications to which this would give rise, to say nothing of the multiplicity of suits

with different carriers which would be likely to ensue, and in order to settle the matter as to all parties once for all, it would have had the undoubted right to go into a court of equity by bill and have the legality of the practice tested, and, if found to be unjustified, enjoined. (*Donovan* v. *Pennsylvania Co.,* 199 U. S., 279.) Indeed, the only question would seem to be whether this was not the course which the company, even considering the provisions of the statute, was required to pursue, the legality of the demurrage charge being the only thing involved, and that being a matter for the courts and not for the commission to decide. (*Hite* v. *Central Railroad of New Jersey,* 171 Fed., 370. See also *Danciger* v. *Wells Fargo & Co.,* 154 Fed., 379, and *Langdon* v. *Pennsylvania R. R.,* 186 Fed., 237.) It was decided, however, in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (204 U. S., 426) that redress by a carrier against an unjust and unreasonable rate must be sought in the first instance by proceedings before the Commission, and that only after that could an action be maintained against the carrier for reparation based on the result. This conclusion was reached, and the common law right of action otherwise existing held to be abrogated by implication, in view of the system established by the enactments with regard to rate regulation by the Interstate Commerce Commission, and as necessary to the efficiency of that system, which otherwise would be subverted and made nugatory. And this was repeated in

Baltimore & Ohio Railroad v. *Pitcairn Coal Co.* (215 U. S., 481), where it was held that, for the correction of an unequal distribution of cars, a shipper was similarly required to go to the Commission, and could not in advance of its action seek to remedy by mandamus the discrimination alleged. And *Morrisdale Coal Co.* v. *Pennsylvania Railroad* (183 Fed., 929) also is to the same effect. But if that be so, there can be no serious question as to the propriety, if not the necessity, for the present petitioner going first to the Commission to have determined whether the demurrage charge in controversy was a just and reasonable requirement. And it can not be that the implication by which this is brought about is to be carried so far as to make the action of the Commission conclusive where relief is denied. There is no such compelling necessity in order to save the system; nor is the statute to be construed as requiring exclusive resort to a tribunal where the rights of the party can be only partially determined at the sacrifice of other rights which the courts of the land are appointed to consider and defend. This is not to deny that in questions of fact, or where judgment or expediency is involved, the action of the Commission in denying relief, the same as in granting it, may not be final. But where, as here, it is not the amount that is in dispute—$1 a day per car being recognized as reasonable if there is to be any charge—but the right of the carrier, under the circumstances, to make any charge at all, it is not to be implied, unless there is

no escape from it, that the decision of the Commission adverse to the shipper is to foreclose the question. And while the dismissal of a complaint by the Commission in a case like the present one may not in strictness be an order, in that it does not require or prohibit that anything shall or shall not be done, it is so in substance and effect, in that, by refusing to interfere with the practice or the charge complained of, it virtually approves it and makes it operative. If it was required by the act to hold that a court could not interfere with such an order however confiscatory to the shipper it might be, the shipper being thus without legal redress, the act might well be declared unconstitutional as wanting in due process of law.

The action of the Commission, if to be given any force, having thus the effect of an adverse decision with respect to the question involved, must be regarded, even though negative in character, as an order within the meaning of the statute, which the courts may enjoin or set aside if legal or equitable grounds for doing so are found to exist. The petitioner therefore correctly came into this Court, as it could previously have gone into a Circuit Court of the United States—the requisite amount being involved and the case being one arising under the Federal law—to have the action of the Commission dismissing its complaint set aside and the demurrage charge disallowed, if that should be the conclusion reached with regard to it, either by direct

decree or by remanding the case to the Commission with directions to sustain the complaint.

But while the jurisdiction of this Court in the premises is thus sustained, we are forced to conclude, upon a consideration of the merits, that the demurrage charge in controversy was lawfully imposed, and that the petitioner therefore has no just ground for complaint. The argument against the charge proceeds upon a misconception. Baldly put, as an exaction for the use by the shipper of his own cars while standing on his own private tracks, the right to it might well be questioned. Neither is it to be sustained as compensation to the carrier for an additional service not covered by the transportation charge, that is to say, for the storage of the freight with which the cars are loaded, that storage being in the cars and on the tracks of the shipper and not in or on anything which the carrier has supplied. (In re Demurrage on Private Tank Cars, 13 Inter. Com. Com. Rep., 378, 381.) It is difficult also to see how the imposition of demurrage on private cars for delay in unloading is necessary to prevent unjust discrimination, the shipper who is able to provide such cars having an advantage over those who can not, which this regulation is supposed to correct. The ability to own private cars is a mere matter of capital which the undue withholding or the prompt unloading and releasing of them can hardly affect, and the difference in financial circumstances is an advantage, which the law can not undertake in this

way to overcome. (*Peavey* v. *Union Pacific Railroad,* 176 Fed., 409, 419.) It may not be consistent also with the exaction of this charge that provided only the cars are unloaded within the free time allowed, they may be reloaded and retained by the shipper indefinitely without any claim being made for demurrage. If this, which is the practical construction of the rule, is to be accepted as the correct one, it throws serious doubt on its validity, the real ground on which the charge is to be sustained being the right of the carrier to have the cars promptly returned into service, which this has the effect to undo. Nor is the condition of the cars, once they have been delivered to the shipper, whether loaded or unloaded, of any concern to the carrier, except as an end to getting them back into use again. And there is also an apparent inconsistency in holding inbound cars liable to demurrage after they have been delivered and are on the tracks of the owner until they are unloaded, barring the free days, and yet in imposing it on outbound cars without regard to when they are loaded, only from the time they are placed on the interchange tracks. The justification of the rule is therefore to be sought in something outside of all this, upon a determination of the real principle involved.

It is not necessary to decide whether a railroad can refuse or be required to haul private cars. Whatever may be its duty in this regard, it is conceded that such terms may be imposed as a condition to hauling them as have a reasonable relation

to the transportation service in which they are employed. And this concession necessarily sustains the present charge. In using these cars, whether as supplementary to or in place of their own, the railroads are entitled to require that there shall be a reasonably dependable supply, and that such cars shall not be withdrawn at will to serve the private purposes of the owners, but shall be kept in active and steady use, and to that end that they shall be put on a footing in this respect with other cars. The interest of the carrier that this should be the case is clear. For the time being these cars become a part of the rolling stock of the road, taking the place of those which the carrier would otherwise be called upon to supply. It may be that there are some kinds of these cars, such as the tank cars here, which the railroads do not keep on hand, but rely on each shipper furnishing his own. But that does not change the principle involved. In one form or another, the carrier is bound to supply the necessary transportation facilities for handling every kind of freight. And this, not to one shipper only, but equally and without discrimination to all. And it is put at a disadvantage and an extra burden upon it imposed if it can not be assured with regard to the supply of cars on which it can depend, but is liable to run short or be in excess, according as private cars are released or withheld. This the demurrage charge which is complained of is calculated to overcome, and therefore may justly be imposed. The purpose of demurrage is to force the cars back

into use. Delay is made expensive, so that it may be an object to the shipper which he can not afford to disregard. Its exaction from private cars, the same as others, is therefore neither arbitrary nor unjust.

Nor is it violative of the owner's rights. It is simply a condition to the acceptance of his cars, which, for the reasons given, the carriers have found it necessary to impose, and with which therefore he must expect to comply. Presumably the use of these cars operates to his advantage, or he would not be at the expense of supplying them. But he can not expect that the advantage shall be all on one side. And it having been found by experience that demurrage on private, the same as on public, cars is a necessary transportation regulation, which is justified on principle, the carriers were within their rights in imposing it by the rule in question, and it must therefore be sustained.

The petition will be dismissed on the merits with costs.

KNAPP, *Presiding Judge,* concurring: The conclusion reached in this case is undoubtedly correct, and I disagree with the foregoing opinion only so far as it questions the right to enforce the demurrage rule in controversy for the purpose or in aid of preventing undue preference and advantage to the owners of private cars. The commission based its decision in part on this ground and in my judgment was right in so doing.

United States Commerce Court.

No. 15.—May Session, 1911.

United States ex rel. Attorney General

v.

Union Stock Yard and Transit Co. et al.

ON PETITION AND ANSWER.

Mr. Blackburn Esterline and *Mr. William E. Lamb,* special assistants to the Attorney General, with whom *Mr. James A. Fowler,* Assistant to the Attorney General, was on the brief, for the United States of America.

Mr. Ralph M. Shaw, with whom *Mr. John Barton Payne* and *Mr. Silas H. Strawn* were on the brief, for Union Stock Yard and Transit Company of Chicago and for the Chicago Junction Railway Company.

Mr. W. D. Guthrie for the Chicago Junction Railways and Union Stock Yards Company.

Mr. Willard M. McEwen for Louis Pfaelzer & Sons.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[Nov. 14, 1911.]

MACK, *Judge:*

This proceeding is brought to compel the Union Stock Yard and Transit Company of Chicago (hereinafter called the "Stock Yard Co.") and the Chicago Junction Railway Company (hereinafter called the "Junction Co.") to file with the Interstate Commerce Commission tariffs in conformity with section 6, and reports and statements in conformity with section 20, of the act to regulate commerce (act of Feb. 4, 1887, as amended June 29, 1906; 34 Stat., 586 and 593) and of the rules and regulations adopted by the Commission pursuant thereto, and to enjoin the Stock Yard Co. and the individual defendants comprising the firm of Louis Pfaelzer & Sons (hereinafter called "the Pfaelzers") from carrying out the terms and provisions of a contract made by them, and the Chicago Junction Railways and Union Stock Yards Company (hereinafter called the "Investment Co.") from carrying out its written guaranty of this contract.

The case has been heard on petition and answer. While the answers of the Stock Yard Co. and the Investment Co. neither admit nor deny certain allegations as to the activities of the Junction Co., which the latter in its answer admits to be true, and while no testimony has been offered in the case, it has been presented, both in the briefs and oral arguments by all counsel, on the basis of the truth of those allegations that are so confessed by the

Junction Co. We have, therefore, considered the petition, as against each defendant, in this light.

Although the petition is clearly multifarious in joining mandamus proceedings, authorized by the act to regulate commerce, to secure compliance with its provisions, and injunction proceedings, authorized by section 3 of the act to further regulate commerce known as the Elkins Act (act of Feb. 19, 1903, 32 Stat., 848), to restrain an alleged illegal rebate and discrimination, inasmuch as defendants do not raise this objection, we shall, without approving such practice, proceed to a determination of the petitioner's rights under both aspects of the case.

The Stock Yard Co., a corporation organized in 1865 by a special but public act of the State of Illinois, was thereby authorized not only to maintain stockyards and a hotel, but also to construct and maintain railway lines, tracks, and switches so as to connect its yards, then outside of the city of Chicago, with the tracks of all railroad lines entering Chicago within prescribed limits; to maintain the railroad, and to transport and allow to be transported thereon, between such railroads themselves as well as between its yards and such railroads, property of every kind; to fix the rates of toll, provided "all fees and charges for freight * * * shall be subject to any general law * * * in reference * * * to railroads." It was further authorized to maintain its lines of railway across

public streets and highways, and was given power of condemnation.

The act provided that nothing therein contained should be construed as giving authority to maintain or operate a railroad for the conveyance of passengers or freight in the city of Chicago; but since 1865, the date of the charter, the city of Chicago has been extended so as to cover all of the property of the Stock Yard Co.

It was further authorized by the charter to lease its property. Pursuant to this authority, it entered into an agreement with the Junction Co., a corporation organized under the general railroad act of the State of Illinois, whereby, in 1897, it, in effect, leased to the Junction Co. all of its railroad and railroad equipment for a term of 50 years. Under the agreement the Junction Co. obligated itself to conduct, operate, and manage the property; to perform all duties pertaining to a railroad, or of a railroad character, imposed upon the Stock Yard Co.; and to pay, as rental, two-thirds of the entire net earnings and revenue derived by it from the operation of all its lines of railroad and railroad track.

The Junction Co. further obligated itself to submit its books and papers showing its operations to the nominee of the Stock Yard Co.

The Junction Co., at the time of the lease and for ten years thereafter, was the owner of other railroad property, and was concededly a common carrier within the act to regulate commerce. In

1907, however, it sold all of its other property. Since that time its sole business has been the operation of the railroad so acquired from the Stock Yard Co., lying wholly within the State of Illinois, in substantially the same manner as it had been operated, prior to the lease, by the Stock Yard Co.

The line of road consists of certain main tracks, running east and west from a point on the lake front in the city of Chicago near the intersection of Thirty-ninth Street with the tracks of the Illinois Central Railroad, and thence in a general westerly and northwesterly direction to a point some eight and a quarter miles distant from the lake, all in the State of Illinois, its parallel main tracks between these points aggregating about forty miles. The Union Stock Yards are located about two miles from the lake front, and, in addition to connecting with these yards, the Junction Co. also has switch tracks to other industries located at or near there, aggregating some two hundred and fifty miles, by means of which main and switch tracks it serves in the neighborhood of six hundred and fifty (650) industries, all being in or near what is known as the stock yards district of Chicago.

According to the record in this case, the Junction Co. neither receives goods for carriage on its own account nor deals on its own account with shippers or consignees. It is not necessary for the purposes of this decision to enumerate all of its activities in the operation of the road. Among them is the haul-

ing of loaded cars on behalf of trunk-line carriers, by whom it is employed and paid, from such trunk lines to the industries on its tracks, or to other trunk lines connecting with it. These cars are brought by the trunk-line carriers from points outside of the State destined to points in the district served by it or to points outside of the State. They are placed by the incoming trunk-line roads on what are known as the receiving tracks of the Junction Co., each car being marked with a transfer card, giving the name of the consignee of the freight therein contained, and thus indicating its destination. The Junction Co. picks them up with its own motive power and transports and delivers either to the designated consignee or industry on its line, or, when destined to points beyond the State limits, to the proper outgoing trunk line. These cars are transported in one unbroken line of railroad carriage from the several points where they originate outside of the State, over the line of the Junction Co. after their arrival at Chicago, to the railroad of the outgoing connecting carrier, and then to their points of destination outside of the State; this is done without the intervention of the shipper or consignee, or the performance by either of them of any intermediate act or service; and they move in this way on through bills of lading, covering the whole distance traversed, as do those also which are consigned and delivered to consignees and industries on the line of the Junction Co. in the stockyards district.

For the hauling or so-called switching service so rendered, the Junction Co. is paid by the trunk-line carriers which request the service a specified sum according to an established schedule of tariffs or charges. For instance, for the switching of cars back and forth to and from the receiving tracks of the various connecting trunk lines to the stock-yards, or to the industries in that vicinity, the Junction Co. is paid a certain sum per car by the trunk-line carriers, and this it receives as a distinct switching charge, regardless of the commodity or character of freight in the car, its origin, destination, or the through-freight charge of the trunk-line carriers. No specific charge therefor is made to the shipper or consignee, either by the Junction Co. or by the trunk-line company; the trunk line is said to absorb the charge.

Since the lease of 1897, the Stock Yard Co. has had nothing whatever to do with the railroad or railroad business, which has been carried on exclusively by its lessee. It has confined itself, apart from the operation of the hotel, to conducting a stock yards business, with all which this involves and implies. It is not a dealer in cattle, but simply maintains a public market where all kinds of live stock can be bought and sold. As part of this business, it receives and cares for stock delivered by trunk line carriers at its docks and chutes, unloading them for a specific amount per car paid to it by the carriers. The stock, so unloaded at its yards, is mostly stock consigned on through bills of

lading to parties doing business in and around the stock yards or stock yards district, which has been transported by the carriers from points outside of the State to the stock yards or to points on the line of the Junction Co. It also loads onto cars furnished by the trunk-line carriers stock outbound from the yards, for which it similarly receives a fixed sum per car from the carrier for which it performs this loading service, the stock so loaded being generally consigned from owners and dealers doing business in and about the stock yards district and being moved on through bills of lading over the Junction Co. tracks to the tracks of the trunk-line carriers, which haul them to points of destination beyond the limits of the State. The Stock Yard Co. also loads and unloads live stock consigned to or shipped by industrial establishments located along the right of way of the Junction Co., for which service the trunk-line carrier that handles the shipment pays a fixed sum per car. By reason of these facilities and business arrangements both live and dead freight is moved in an unbroken line of railroad carriage on through bills of lading from points outside of the State of Illinois to the stock yards and industrial establishments located in that vicinity, and from such stock yards and industrial establishments to outside points. The Stock Yard Co., however, neither issues bills of lading for these shipments, whether through bills or others, nor participates in the freight rates charged by the carriers. It is com-

pensated solely in the manner indicated for the services which it performs. It does advance to the carriers, however, the freight charges due on bills of lading for stock delivered at the stock yards, collecting the same in turn from the consignees. But these advancements are made for the convenience and accommodation of its customers, the commission men, who buy and sell stock at its yards, and have nothing whatever to do with the charges which it makes for loading and unloading. These are paid by the trunk line carriers as a separate matter. As part of its stock yards business the Stock Yard Co. further frequently feeds and waters live stock in transit, for which it is similarly paid a fixed compensation by the carrier handling the stock to and from its yards. And it also feeds, beds, and waters live stock shipped to consignees doing business at or near its yards, for which it is paid by the commission men who are engaged at its yards in buying and selling cattle. It also frequently makes alterations and repairs in cattle cars, for which it is paid by the carrier requesting the service. And, finally, for the accommodation of its patrons it has built and conducts a hotel in the neighborhood of its yards as empowered by its charter.

The Investment Co. is a corporation organized under the laws of the State of New Jersey solely as an investment company for the purpose, among other things, of holding stock of the Stock Yard

Co. It owns over 90 per cent of this stock as well as practically all of the stock of the Junction Co., but it owns none of the property of, and neither manages nor controls, either company, except in so far as its stock ownership enables it to elect their directors.

The contract between the Stock Yard Co. and the Pfaelzers in substance obligates the former to pay $50,000 to the latter in order to enable them to rebuild their packing plant at a specified place in the neighborhood of the Stock Yard Co.'s premises. In consideration thereof the Pfaelzers bind themselves to rebuild the plant, to conduct their business exclusively at the specified place, and either to buy all live stock slaughtered or packed by them in or within 200 miles of Chicago, for a period of fifteen years, at the yards of the Stock Yard Co., or, in lieu thereof, to pay it the same customary yardage, tolls, and charges that it would receive if such live stock were sent to its yards and there bought by them.

The questions presented on this record are:

First. Is the Junction Co. a "common carrier engaged in transportation of property by railroad from one state to another state of the United States" within section one of the act to regulate commerce and therefore subject to the provisions of sections 6 and 20 thereof?

Second. Is the Stock Yard Co. the owner of a railroad engaged in interstate commerce" within

such section 20 and therefore subject to its provisions?

Third. Is the Stock Yard Co., a common carrier within such section one and therefore subject to section 6 thereof and also to the provisions of section 3 of the Elkins Act?

Fourth. Is the Investment Co. such a carrier and therefore subject to section 3 of the Elkins Act?

Fifth. Are the contract and guaranty a violation of the act to regulate commerce or of the Elkins Act?

First. Counsel for the Junction Co. expressly concede in this case that it is a common carrier. They deny, however, that it is engaged in interstate commerce. Counsel for other defendants, while not expressly denying, nevertheless intimate that it is not a common carrier.

That it is a common and not a private carrier, if it be a carrier at all, is manifest from the fact that it is organized under the general railroad law of Illinois; under its constitution, article 11, section 12, all railroads are "declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." Moreover, it offers its services by the publication of a tariff in general circulation in Chcago to all the public who are in a position to avail themselves thereof. That the class is a limited one does not

affect the nature of the business or render it any the less public or common in its character.

It is, however, suggested that it is not a carrier at all because what it hauls is the loaded car, and not the freight itself with which the car is loaded.

That cars as well as other property may be the subject matter of carriage is, however, well established: *P. & P. U. Ry. Co.* v. *C. R. I. & P. Ry. Co.* (109 Ill., 135); *M. P. Ry. Co.* v. *C. & A. Ry. Co.* (25 Fed., 317); *U. S.* v. *C. & N. W. Ry. Co.* (157 Fed., 616, 619).

It is further contended that the trunk line alone is the carrier and that the Junction Co. is merely its agent and instrumentality, and only as such agent performing, not a transportation or carriage, but a mere switching service. This service is likened to that of a towboat, which, under some circumstances and in some jurisdictions, is held not to be a carrier.

That the trunk line has agreed to carry beyond its own line, and has expressly assumed a liability for the acts of connecting carriers, which, under the so-called Carmack amendment to section 20 of the act to regulate commerce (act of June 29, 1906, 34 Stat., 584, 595), the law would now impose upon it as the initial carrier, does not, however, render the connecting carrier any the less the transporter or carrier of the property while it is actually hauling the loaded car on its own tracks, with its own motive power and its own servants, absolutely free

from any control or direction on the part of either trunk line. To call this service a switching service does not, in any respect, change its character; whether the work done be to switch a car 1 mile or to haul it 200 miles, it is none the less a transportation or carriage of the car and its contents by an independent operator. As was well said in *M. P. Ry. Co.* v. *Grocery Co.* (55 Kans., 525):

"A railroad transporting a carload of freight one mile, using a switching engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight train. The fact that compensation for this particular service was paid by the St. L. & S. F. Ry. Co., while it might render that company also responsible, could not relieve defendant company from its liability as a carrier."

If then it be a common carrier of this property, it must be immaterial how or by whom it is paid. Whether its rate is a flat one or a proportion of the through rate, whether it is paid by the trunk line and absorbed or by the shipper or consignee, does not determine the nature of its services or alter the character of its offer to the public—to serve them as a common carrier.

The Interstate Commerce Commission in *Cattle Raisers' Association* v. *F. W. & D. C. Ry. Co.* (7 I. C. C. Rep., 513, 536), while holding, as counsel urge, that this very Stock Yard Co., under which the Junction Co. holds by lease, was not, prior to the lease of 1897, a common carrier in certain of its

activities, also expressed the opinion which counsel have not noted, that it was a common carrier with reference to the activities hereinabove described and now performed by the Junction Co. The Commission moreover point out (p. 537) that the Bridge Co., in *K. & I. Bridge Co.* v. *L. & N. Ry. Co.* (37 Fed., 567), which is here relied upon, was not, under its act of incorporation, a common carrier at all.

In *Union Stock Yards Co. of Omaha* v. *U. S.* (169 Fed., 404), the Circuit Court of Appeals while holding, as counsel claim, that the Stock Yard Co. of Omaha was not a common carrier in its stock yards activities, also held that, as to its railroad activities, which are identical with those of the Junction Co., it was a common carrier engaged in interstate commerce within the Safety Appliance Law. On this point, Mr. Justice Van Devanter said:

"It is the contention of counsel for the stockyards company that the service performed by it is such only as the railroad companies are bound to perform for their patrons; that having no facilities for performing this service at South Omaha, the railroad companies merely employ the stockyards company to furnish the requisite facilities and to operate them; that the performance of this service under such an employment does not make the stockyards company a common carrier or its property used therein a railroad; and that this service is purely a local switching service which fol-

lows or precedes transportation, and is not interstate commerce. * * *

"It is of little significance that the stockyards company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire a part of the transportation of every live-stock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

Belt Ry. Co. of Chicago v. *U. S.* (168 Fed., 542); *U. S.* v. *Sioux City Stockyards Co.* (162 Fed., 556); *U. S.* v. *Union Stockyards Co.* (161 Fed., 919); and the dictum in *McNamara* v. *The Wash. Terminal Co.* (39 Wash. Law Rep., 458) are in accordance with the decision of Mr. Justice Van Devanter, and hold a company performing these activities not only a common carrier but also engaged in interstate commerce within the safety appliance or employer's liability acts.

If, then, the Junction Co. be, at least as to some of its activities, a common carrier, is it also "engaged in the transportation of property by railroad from State to State"?

Its location wholly within one State, the switching nature of its activities, which are said to be merely incidental to the transportation within that State, and its failure to receive a division or definite percentage of the through interstate rate, are urged in support of the contention that it is not engaged in

transportation from one State to another. Counsel, moreover, contend that the amendment of June 29, 1906, to the first section of the act to regulate commerce, narrows the class of railroads wholly within one State that are now subject to the act. Prior to the amendment, the act read: "Common carriers engaged in the transportation of property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment, from one State to any other State." By the amendment of 1906 the clause beginning "or partly" and ending with the word "shipment" was inclosed in parentheses.

It is urged that under the correct construction of the original section one, a railroad, even though wholly within one State, came within the act if it carried freight within that State under a common arrangement with an interstate carrier; but that, since under the amendment the common arrangement refers only to transportation partly by water and partly by rail, a carrier operating wholly by rail and within one State does not come within the amended act, even though it operate under such a common arrangement; in other words, that only railroads whose lines cross State boundaries are now subject to the Commission.

The case of *C. N. O. & T. P. Ry. Co.* v. *I. C. C.* (162 U. S., 184) does not, however, sustain the contention that prior to the amendment the clause "under a common control," etc., affected as well

the carriage wholly by railroad as the carriage partly by railroad and partly by water. (*U. S.* v. *Colo. & N. W. Ry. Co.,* 157 Fed., 321, 329, 332.)

Whatever be the true construction of section one as originally framed—and we agree with the Circuit Court of Appeals in *U. S.* v. *Colo. & N. W. Ry. Co.* (157 Fed., 321, 327), that "it is probable that the clause 'under a common control, etc.,' qualified carrriers 'partly by railroad and partly by water' only, and had no application to such carriers 'wholly by railroad'"—it is clear that the sole purpose of the amendment was to remove any possible doubt on this point and not to withdraw from the operation of the act railroads wholly within one State, but engaged in the transportation of articles while moving in interstate commerce, whether with or without a common arrangement with connecting lines. (*U. S.* v. *C. & N. W. Ry. Co.,* supra, at 328.)

The interstate commerce begins with the shipment of the article in one State directed and destined to another State. It ends only with the delivery at destination. All common carriers by railroad which participate in its actual transportation from the time of shipment to the time of delivery are engaged in the transportation of property from one State to another, whether their services be performed wholly within one State or in more than one State, whether such services be primary and called carriage or incidental and called switching, whether the carrier be paid a flat sum per car or

a percentage of the through rate, and whether such payment be made directly by the shipper or consignee on the one hand or by the initial or final carrier on the other hand. (*U. S.* v. *Ill. Term. Ry. Co.,* 168 Fed., 456; *Pac. Coast Ry. Co.* v. *U. S.,* 173 Fed., 448.)

While it is conceded that the cases above cited support these views, at least when the safety-appliance acts are in question, it is sought to distinguish most of them on the ground that the safety-appliance acts and the interstate commerce act have a different purpose and scope; that the former are intended primarily to regulate the cars at any time used in interstate commerce, and not primarily the carriers themselves in their relation to the public. Some statements from the decision of Judge Sanborn (*U. S.* v. *C. & N. W. Ry. Co.,* 157 Fed., 321) to the effect that the two acts are not in *pari materia,* and therefore not necessarily to be construed alike, are cited in support of this contention. The argument, however, which was answered in that opinion, was as follows: The original interstate commerce act subjected to the control of the Interstate Commerce Commission a carrier by railroad within one State only if it operated under a common arrangement with a carrier in another State. That act was passed in 1887. In 1893 the first safety-appliance act was passed. In terms it applied to every "carrier by railroad engaged in interstate commerce." Nevertheless, as it, too, sub-

jected carriers to the control of the commission, the broad language must be deemed limited to the class of carriers affected by the act of 1887, because the act of 1887 clearly declared the intent of Congress as to the extent of the class over which the commission should have control.

The answer to this argument, given by the court, was twofold: First, the major premise, though adopted by some courts, was erroneous; all common carriers engaged in interstate transportation wholly by railroad were embraced within the terms of the original act to regulate commerce. Second, even if it were correct, there was no such relation between the two acts as to cause the court to modify the broad language of the safety-appliance act by expressly inserting therein the limitation of the interstate-commerce act.

It is manifest that this decision does not support the contention of counsel.

Again it is said that the safety-appliance act as now amended (act of Mar. 2, 1903, 32 Stat. 943) requires all cars engaged in interstate commerce, whether owned by an interstate railroad or by a private individual not engaged in the transportation business, to be equipped as therein directed. But whatever the scope of the act may be (*So. Ry. Co.* v. *U. S.*, U. S. Sup. Court, Oct. 31, 1911), only the "common carrier engaged in interstate commerce" is punishable for its violation. Cases holding companies whose activities are the same as those

of the Junction Co., guilty of such a violation, are therefore direct authorities on the question now under consideration.

As therefore the designation used in the several acts, "carrier engaged by railroad in interstate commerce" and "carrier engaged by railroad in the transportation of property from one State to another" are not mutually exclusive, but, on the contrary, the one includes the other; as all of the authorities cited to or found by us expressly hold that such of the activities of the Junction Co. as are hereinabove set forth make it a common carrier engaged in interstate commerce by railroad; we are of the opinion that it is a common carrier engaged in the transportation of property from one State to another, within section 1 of the act to regulate commerce, and as such subject to the requirements of section 6 and section 20 of that act.

Second. By the amendment of June 29, 1906, the commission was authorized, under section 20, to require annual reports, not only "from all common carriers subject to the provisions of this act," but also "from the owners of all railroads engaged in interstate commerce as defined in this act." This is the only section of the act that refers to the *owners* of the railroad as distinguished from the common carrier. The evident purpose of Congress was to enable the commission to obtain certain information which the lessee operator might be unable to give, but which the owner of a railroad,

either operated by a common carrier engaged in interstate commerce as defined in the act or which is a highway of interstate commerce, could furnish. Whichever be the true construction of this clause (*So. Ry. Co.* v. *U. S., supra*) the Stock Yard Co., as lessor, is the owner of such a railroad, and therefore comes within the provisions of section 20. What the obligations are which that section imposes upon such owners, we are not now called upon to decide.

Third. None of the present activities of the Stock Yard Co. as the owner and manager of the stock yards and hotel business, hereinabove fully detailed, in our judgment, make it a common carrier. The facilities which it affords may enter to a certain extent into the carriage of live and dead stock by the railroads with which it has occasion to deal. And the services which it renders in that connection may take on a public character. (*Cotting* v. *Kansas City Stock Yards,* 183 U. S., 79, 85.) But that does not affect the case. A carrier must transport or carry. It must actually engage, in other words, in the carriage of goods or persons from point to point, of which there is no semblance in anything which is done here. (*Union Stock Yards* v. *U. S.,* 169 Fed., 404, 406.)

It is said, however, that the charter of the Stock Yard Co. contemplated that it should build and operate a railroad to connect with the trunk lines which enter Chicago, and empowered it so to do; and that it can not escape this charter obliga-

tion or put off the character of a common carrier thereby impressed on it, either by not exercising the power or by turning over to another company the railroad which it built. The corporate character of a company—and much less the business in which it is engaged—is not determined by its reserved and unused powers. (*Tiffany* v. *La Plume* Condensed Milk Co., 141 Fed., 444; *Cate* v. *Connell,* 173 Fed., 445.) It is what it does, and not simply what it may do, by which it is to be judged. A corporation would in no sense be a common carrier if it never constructed or ran a railroad or other means of transportation merely because it had the charter power. But the Stock Yard Co. did exercise such power; it built and operated the railroad. It was, at that time, a common carrier. (*Cattle Raisers' Ass'n* v. *F. W. D. C. Ry. Co.,* supra.) It has, however, pursuant to its charter power, leased its entire railroad property. Thereupon the railroad, with the locomotives and cars required to run it, went out of the possession and control of the Stock Yard Co., which thereafter confined its operations to the stock-yard business under its other charter powers. Clearly the mere reversionary ownership of the railway, which it retained, did not make it a carrier or impose upon it the obligations or duties of a carrier.

While under the law of Illinois (*Penn. Co.* v. *Ellett, Admr.,* 132 Ill., 654) and of some other States, a lessor is liable like a common carrier for damages caused by its lessee, an independent operating company, the weight of authority appears to be con-

trary to this view. (1 Elliott on Railroads, sec. 468.) In any event, the Federal courts in Illinois have refused to follow the Illinois doctrine (*Yates* v. *Ill. Central Ry. Co.,* 137 Fed., 943; *Curtis* v. *C., C., C. & St. L. Ry. Co.,* 140 Fed., 777) on the ground that this is a question of general law. Moreover, whatever may be the liability of a lessor railroad for damage to persons or property while being transported over the railroad owned by it but operated by a lessee, that liability, if any, is due to the obligations imposed upon it by the State. The State may declare that a non-operating lessor shall be liable to the same extent as a common carrier for such damages. It can not, however, by such a declaration make the lessor a common carrier in fact, within the meaning of the act to regulate commerce. Common carrier as therein used is to be taken in its ordinary signification of the one engaged in the actual work of transportation; that is, the operating company. Any doubt that may theretofore have existed on this point is, in our judgment, removed by the amendment of 1906 to section 20 of the act, whereby, in express terms, the owner of a railroad engaged in interstate commerce is referred to in contradistinction to the common carrier subject to the act. The decision of the Interstate Commerce Commission in *Independent Refiners' Ass'n.* v. *P. R. Co.* (6 I. C. C. R., 52) in so far as it holds the lessor, merely as lessor, liable for the lessee's violation of its obligations under the interstate-commerce act is not to be supported.

The commission in that case, however, based the liability of the lessor also on the fact that it received as rental not a fixed annual sum, but one-half of the gross revenues. A holding of the Circuit Court for the Western District of Pennsylvania, in accordance with this ruling of the commission, that lessor and lessee thereby were to be deemed in a sense joint operators, was, however, reversed in the Circuit Court of Appeals. (*Western N. Y. & P. R. Co.* v. *Penn Refining Co.*, 137 Fed., 343, 356.) There would seem to be no difference in the relation between a lessor and a lessee when, as in that case, the rental is a percentage of the gross receipts, and when, as in this case, the rental is a percentage of the net receipts. The test of a joint operation by lessor and lessee corporations, like that of a partnership between individuals, is not a sharing merely in the net profits of the enterprise. (*Holmes* v. *Old Colony R. R. Co.*, 5 Gray, 58.) The Stock Yard Co. can not be deemed a joint operator with the Junction Co. and therefore a common carrier within the act to regulate commerce, merely because it receives two-thirds of the net revenues of the Junction Co. or because its auditor acts for both companies.

Even if the Investment Co., by reason of its ownership of the stock of the Junction Co., could be held to be in such control of the Junction Co. as, for some purposes, to make the two identical, nevertheless, the Stock Yard Co. would not thereby, and through the ownership by the Investment Co. of

90 per cent of its stock, become a common carrier. It was the common carrier's ownership of 99 per cent of the stock of the Wharf Co. organized for the very purpose of furnishing it terminal facilities as a part of the interstate system, that, in *Southern Pacific Terminal Co.* v. *I. C. C. & Young* (219 U. S., 499) was held to make the Wharf Co. a part of the common carrier's system and, therefore, a common carrier subject to the act. We see no analogy to the situation in this case.

Fourth. The Investment Co., whatever may be its control over the Junction Co. or the Stock Yard Co., can not, in any sense, be deemed a common carrier. Its ownership of the entire stock of the Junction Co. would not make it, any more than such ownership would make an individual, a common carrier. It might be termed, in a sense, the owner of a common carrier, but, as it is not itself a common carrier, it does not, in our judgment, come within section 1 of the interstate commerce act, or section 3 of the Elkins Act.

Fifth. While section 1 of the Elkins Act as amended (act of June 29th, 1906, 34 Stat., 584, 587), after prohibiting "any person or corporation" from rebating or discriminating in respect to an interstate transportation, subjects to criminal prosecution "any person or corporation, whether shipper or carrier," who knowingly violates its provisions, section 3 of the Elkins Act, under which this suit is brought, authorizes equity proceedings to enjoin such offenses only when a

" common carrier " has committed or is about to commit them. If the decision in *I. C C.* v. *Reichman* (145 Fed., 235) correctly holds that one who is neither shipper nor carrier can be prosecuted under section 1—as to which we intimate no opinion—the question whether the proposed payment to the Pfaelzers could in any way be deemed such a rebate or discrimination could be tested by proceedings thereunder in the proper forum.

We have found it unnecessary to determine or even to consider it, in view of our conclusion that neither the Stock Yard Co. nor the Investment Co. is a common carrier.

Section 6 of the interstate-commerce act imposes a positive duty on common carriers subject thereto in respect to the filing of tariffs and other documents. Section 20, on the other hand, merely authorizes the commission to require reports from common carriers and owners of railroads engaged in interstate commerce. There is no allegation in the petition filed in this cause that the Interstate Commerce Commission in any manner, either by general or special order or otherwise, has ever required the Junction Co. or the Stock Yard Co. to furnish any such reports as are contemplated under section 20. In the absence of such an order, no mandamus to make such reports can be issued by this court.

It follows, therefore, that the petition must be dismissed, not only as against defendants other

than the Junction Co. and the Stock Yard Co., but also as against the Stock Yard Co., and the relief prayed for under section 20 of the act must be denied as against the Junction Co.

The mandatory writ will be issued against the Junction Co., as a common carrier subject to the act, to comply with its obligations under section 6 thereof.

ARCHBALD, *Judge,* dissenting in part.

The petition is well dismissed as to the three respondents, with respect to whom it is found that neither the Elkins nor the interstate commerce act apply. It is held, however, that the Junction Railway Company is a common carrier engaged in interstate commerce and therefore liable to publish tariffs and to make reports, and as to this I feel compelled to dissent.

Nothing of the kind can be predicated on the use which the Junction Railway Company permits of its tracks by the trunk-line carriers as a connecting link, to haul by their own motive power through trains moving from one to the other, east or west. In the loan of its tracks for this purpose, however regular or persisted in, it is not exercising any of the functions of a common carrier even though it take tolls therefor, any more than a turnpike road, upon which people travel; or a toll bridge spanning a stream, which accommodates those who go across; or a canal, which, without doing any towing, merely maintains a waterway for public use. (Moore Carriers, p. 66, 67; *Kentucky & Indiana Bridge Co.*

v. *Louis. & Nash. R. R.*, 37 Fed., 573, 615; *Grigsby* v. *Chappell,* 5 Rich. (S. C.), 443.) The traffic which, by leave of the Junction Railway Company, goes on over its tracks in this way is that of the trunk lines using them and not of the Junction Railway. The charges for through carriage, including this part of the movement, are made by and paid to these lines, and the Junction Railway does not participate by division or otherwise therein. Neither does it know or come in contact with the shippers or consignees or with the freight which is so moved. It simply lets its road and gets pay for its use at so much a car, which neither makes it a carrier nor constitutes an engagement by it in interstate trade.

Neither is there anything to make it a common carrier in what it does at the Union Freight Station, which it maintains, in the way of receiving, distributing, and forwarding L. C. L. freight. So far as it acts with respect to this for the Baltimore & Ohio Railroad it acts as the local agent of that company, and is not chargeable in any larger degree. The receiving, loading, and forwarding which it does for others, including the collection of freight charges, when required by the trunk-line carriers to be prepaid, and the giving of receipts which are exchangeable for bills of lading therefor, may be of a somewhat more general character. But in no respect do they amount to a transportation of such freight by the Junction Railway on its own account, nor does the Junction

Railway Company in any sense act as a common carrier with respect thereto. It merely serves as a receiving and forwarding agent, for which it is compensated by the trunk line carriers by which its services are invoked. Having no concern as such agent in the transportation of this freight, nor any interest in the freight rates charged, and the services being complete when rendered and confined to the mere handling of the freight in the act of receiving and forwarding it, there is nothing in any of this upon which a common carriage can be charged. (Moore Carriers, p. 68.) And the same is true also with regard to the weighing of freight which it does, even though these weights are at times made the basis of freight charges and adjustments between carrier and consignor or consignee. These activities are alluded to at this time, not only because they are set up in the bill, but because they are necessary to be considered in connection with the other things which it does in determining the character which the Junction Railway Company in fact bears, which, to the extent of these activities at least, is plainly that of a mere intermediary or local agency of the trunk-line companies for which the services are performed. And this character, in all that it does, it consistently maintains.

The so-called hauling and switching services, however, remain. And for a full understanding of them, they must be given somewhat at large. The practice in this regard with respect to live and

dead freight is not exactly the same. Where inbound live stock originates outside of the State, and is destined to points in the stockyards district, the trunk line on which it arrives generally hauls it with its own motive power over the tracks of the junction railway from the connecting point to the unloading docks, chutes, and platforms of the stockyards company; although horses are usually delivered by the Junction Railway Company after having been received from the trunk line by which they are brought in. Outbound carload shipments of live stock, however, which originate in the stockyards district and are destined to points outside the State, after being loaded into cars placed by the Junction Railway Company at the loading chutes of the stockyards, are hauled by the Junction Railway over its tracks and delivered at the proper connecting point to the trunk line which is to transport them beyond. Dead freight in carload lots brought by the trunk line carriers from points outside of the State, destined to points in the district served by the Junction Railway on the line of its tracks, and sometimes also destined to points beyond, is placed by the trunk line roads on what are known as the receiving tracks of the Junction Railway, each car being marked with a card, giving the name of the consignee, by which its destination may be known. And these cars the Junction Railway Company picks up with its own motive power and delivers to the designated consignee or industry; or, where they are destined to points beyond

the State, delivers them to the proper connecting outgoing trunk line, according to the destination indicated thereon. Through shipments of this kind move on bills of lading covering the whole distance traversed, including the tracks of the Junction Railway. And the same is true of consignments to and from the Union Stockyards or the industries of the stockyards district adjacent to the railway company's line. But the Junction Railway Company is not known to the shipper or the consignee in the transaction, all that it does being done for the trunk line carrier which employs it, by which it is paid so much a car. And this payment also it receives as a distinct switching charge, regardless of whether the car is loaded or empty, or where it is to go to or where it comes from. The question then is whether by reason of what it so does the Junction Railway Company is a common carrier engaged as such in the transportation of persons or property in interstate trade, within the meaning of the law.

It is claimed that it is because it participates in the movement of the freight which passes over its tracks in the channels of commerce in the way which has been described, in which movement, it is said, it is an integral and essential factor and not a mere local aid. (*C. N. O. & T. P. R. R.* v. *Inter. Com. Com.*, 162 U. S., 184.) But to me that does not seem to be the case. The part which it takes in that movement is a purely local and incidental one, in no respect having anything to do

with the movement of freight, as freight, and much less as interstate freight, its services being confined to the mere handling of the cars in which the freight is contained, this being carried on and completed also wholly within the State, and not, in any respect, extending to anything beyond. It knows no one outside of the trunk line carriers by which it is employed, and does not come in contact or have any relation with the shipper or consignee except as agent of the trunk line carriers in the receiving and delivering of freight. Nor has it anything to do with the freight rates charged, the tolls which it gets being taken care of by the trunk lines without appearing in those rates. The service which it performs is a mere shifting or switching service, having no relation to anything outside of that so far as it is concerned. Its undertaking is to shift the cars and not the freight which they contain, in the movement of which freight it has no interest, and as emphasizing this it is paid by the car without regard to contents, origin, or destination, whether to or from points within or without the State. When the cars are being moved by the Junction Railway Company the carrier for which in each instance this is being done, in legal contemplation as well as in actual effect, is transporting them, the Junction Railway Company, by its engineers and employees, being merely the medium by which it is accomplished. To engage in transportation within the meaning of the law there must be a participation in the result; to

merely touch it in passing, as here, is not enough. The statute was enacted to regulate interstate commerce, and there must be a direct or proximate connection with interstate shipments to bring the case within its terms; and the mere local shifting or handling of cars in which the commodities move incidentally in transit, wholly within the State where it is done, without any share in the freight paid, the service rendered being performed for the carrier by which the through transportation is being done, is not, in my judgment, engaging in interstate commerce in the commodities or in the interstate transportation of them, with which alone the statute undertakes to deal.

It is no doubt true that railroads performing similar switching services to those which we have here have been held to be engaged in interstate commerce, within the meaning of the safety appliance law. (*United States* v. *Col. & N. W. R. R.,* 157 Fed., 321; *United States* v. *Union Stock Yards of Omaha,* 161 Fed., 919; *Belt Line R. R.* v. *United States,* 168 Fed., 542; *Union Stock Yards of Omaha* v. *United States,* 169 Fed., 404.) But there is by no means a unanimity of opinion among the judges by whom these cases were decided, and, as is pointed out by Judge Sanborn, in the leading one (*United States* v. *Col. & N. W. R. R.,* 157 Fed., 321) the safety appliance act is to be given a broader construction than the interstate commerce act, even though in the description of the carriers, who are made subject to it, the same

terms largely are employed in each; the one act dealing with the physical or mechanical instrumentalities of interstate commerce, looking to the safety of employees, while the other is directed to the business or commercial side, regulating the rates and practices which are there to prevail. These decisions therefore, as it seems to me, are misleading and valueless as precedents, and are not to be applied.

Neither is the case like that of *MacNamara* v. *Washington Terminal Company* (39 Wash. Law Rep., 458), recently decided by the District of Columbia Court of Appeals, on which much reliance is placed. The case there arose under the employers' liability act, the validity of which, so far as the District of Columbia is concerned, does not depend, as it is pointed out, on the right of Congress to legislate with regard to interstate or foreign trade; and the question simply was whether the Terminal Company was a common carrier engaged in trade or commerce in the District within the meaning of the law. Whether the Terminal Company, however, was engaged in interstate commerce was also held to be involved; and, passing upon that question, it was decided that it was. But the considerations which led to this result are to be observed. The tracks and station of the Terminal Company, it is to be noted, are not mere facilities for the handling of passengers and baggage at Washington. As to the railroads entering the city, the Terminal Company completely monopolizes everything that is done.

By its agents and employees it controls the operation of trains over its tracks into and out of the station, and with its engines it shifts empty cars in the making up of trains. Steam railroad passenger traffic, entering and leaving Washington, is thus completely and exclusively managed, operated, and controlled by the Terminal Company within the zone occupied by its station and tracks. The conclusion reached, in view of this, was that it was not to be taken as a mere line of railroad, carried on wholly and independently within the District, but that it was a direct component part of the various railroad systems engaged in interstate commerce, through which an entrance into Washington was obtained. And it is this integral and indispensable part which it has in interstate trade coming into and going out of the city that is the criterion by which its position as a medium of interstate commerce is to be judged. It is, in other words, as with the Southern Pacific Terminal (219 U. S., 498), its relation to and systematic connection with the interstate railroads, of which it forms the Washington end, and its direct participation in the handling and management of the passenger and express traffic there, that makes it a common carrier engaged in interstate commerce within the meaning of the Federal law.

The distinction between that case and the one in hand is clear. The Junction Railway Company was not organized to supply terminal facilities,

nor does it in fact supply them for any interstate railroad or business. Nor is it a component part of any such railroad system. Nor does it, in the hauling and switching services which it performs, take the place for the time being, as to consignor or consignee, of the trunk line carrier for which it acts. It simply moves back and forth, by means of its engines and employees, cars which it is put by the trunk line carriers in the way to take, to which carriers in the performance of that service it is alone responsible therefor. It is not an agency of commerce as such, State or interstate, but of the railroads which have that commerce in charge. It is true that it has a railroad which it operates, over which that commerce incidentally moves. But that does not change the character of the services in which it is engaged. The part which it plays, the relation which it assumes, and the result of what it does, begin and end, so far as it is concerned, with the immediate service which it renders, which negatives the idea that anything like interstate commerce is intended or involved. Not engaging as a common carrier in such transportation, it is not brought in consequence within the terms of the act, and can not be required either to publish tariffs or to make reports. And the petition ought therefore, in my judgment, to be in all respects denied.

United States Commerce Court.

No. 15—October Session, 1911.

United States ex rel Attorney General

v.

Union Stock Yard and Transit Co. et al.

ON PETITION FOR REHEARING.

Mr. Blackburn Esterline and *Mr. William E. Lamb,* special assistants to the Attorney General, for the United States.

Mr. Ralph M. Shaw for Union Stock Yard and Transit Co. of Chicago and for the Chicago Junction Railway Company.

Mr. Willard M. McEwen for Louis Pfaelzer & Sons.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[February 13, 1912.]

Mack, *Judge:*

It is urged that this court, in the opinion heretofore filed, has too narrowly limited its jurisdiction in declining to consider whether or not the

proposed payment by the Stock Yards Company to the Pfaelzers is a rebate or discrimination forbidden by law.

Counsel contend that inasmuch as the Junction Co. which is alleged and has been found by us to be a common carrier engaged in interstate commerce is one of the defendants, therefore, under section 2, as well as under section 3, of the Elkins Act, other parties not common carriers involved in the subject matter of the proceedings may likewise be proceeded against in the same action.

But as we stated in the former opinion, two entirely separate cases have been joined in this proceeding, the one against the Junction Co. and the Stock Yards Co. to compel compliance with sections 6 and 20 of the act to regulate commerce; the other against the Stock Yards Co., the Investment Co., and the Pfaelzers, under the Elkins Act, to enjoin an alleged discrimination and rebate.

While we have not, of our own motion, dismissed the petition for misjoinder of actions and multifariousness, nevertheless we can not deal with the case otherwise than as involving the two distinct causes of action; the fact that the Junction Co. is a party to the first of these does not make it also a party to the second. No relief of any kind is prayed for against it in respect to the alleged discrimination and rebate. If, as we interpret sections two and three of the Elkins Act, a proceeding thereunder in equity can not be maintained against

parties other than a common carrier engaged in interstate commerce unless on proper allegations relief is also sought against the commission by such a carrier of one or more of the acts therein prohibited, the fact that the Junction Co., which is such a carrier, is a party defendant on the other branch of the case furnishes no basis for this proceeding against the other defendants.

But counsel further urge that, inasmuch as the Stock Yards Co. is, in good faith, alleged to be an interstate common carrier, this court not only has jurisdiction but is in duty bound to determine the legality of the contract with the Pfaelzers.

There is no question as to the jurisdiction of the court in the premises; the petition purports to state a case under the Elkins Act. If the defendants had admitted that the Stock Yards Co. was an interstate common carrier, the only question to be determined by this court would have been the legality of the contract. But when the defendants denied this allegation, they raised an issue of fact the determination of which necessarily preceded any consideration of the issue of law. When that issue of fact was decided in their favor the petition had to be dismissed.

The court nevertheless had the power and the right to base its decision on either or both of two possible grounds, and if we had been clearly of the opinion that such a contract as the one in question, made by an interstate common carrier, were legal,

the petition would have been dismissed on both grounds.

The only case stated, or that could properly have been stated in the petition, was one charging that an interstate carrier had made a contract in violation of the law. Defendants, however, are now asking us to decide a totally different question—whether or not such a contract made by one not a carrier is legal. However important it may be to them to secure an authoritative ruling thereon, any answer that we might give would not be responsive to the issues raised in the case before us, and would, therefore, be a mere dictum, and of no binding force.

No authority has been vested in this court to advise parties, on their application, whether proposed undertakings would, if consummated, violate the law, or, on the application of the Government, to enjoin the commission of alleged illegal acts, except only when such an injunction is sought against an interstate common carrier.

An order will therefore be entered in accordance with the original opinion filed herein.

United States Commerce Court.

No. 18.—October Session, 1911.

Russe & Burgess

v.

Interstate Commerce Commission, respondent; and United States, Illinois Central Railroad Company, and Atchison, Topeka & Santa Fe Railway Company, interveners.

ON DEMURRER TO PETITION.

For opinion of Interstate Commerce Commission see 13 Inter. Com. Com. Rep., 668. See also 190 Fed., 659.

Mr. W. A. Percy for petitioners.

Mr. P. J. Farrell for Interstate Commerce Commission.

Mr. James A. Fowler, assistant to the Attorney General, and *Mr. Blackburn Esterline,* special assistant to the Attorney General, for the United States.

Mr. R. Walton Moore, Mr. Frank W. Gwathmey, Mr. Robert Dunlap, and *Mr. T. J. Norton* for intervening carriers.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland and Mack, Judges.

[February 13, 1912.]

ARCHBALD, *Judge.*

Complaint was made to the Commission by the petitioners, Russe & Burgess, with others, against numerous railroads, members of the Trans-Continental Freight Bureau, charging that excessive rates had been exacted for the transportation of lumber from Chicago and Mississippi River points to the Pacific coast, and asking for reparation. The Commission, upon due investigation, found that the existing rate of eighty-five cents per hundred pounds was more than was reasonable; that seventy-five cents was a reasonable rate, which it fixed as the maximum rate for the future; and that the complainants were entitled to reparation on this basis for shipments subsequent to the filing of their complaint, but not on prior shipments because of laches. And on application for a rehearing by complainants this ruling was re-affirmed. The petitioners thereupon filed their bill in the Circuit Court of the United States for the Northern District of Illinois, praying that the order of the Commission, so far as it denied reparation prior to the filing of the complaint, be set aside and the Commission enjoined and required to proceed and correct its order so as to allow the reparation contended for, ascertaining by appropriate

action the amounts severally due to the different petitioners. There was also a prayer for a decree against the respondent railroads for the amount of the excess charges which had been paid, but it was admitted that this feature of the case could not be maintained and it was therefore abandoned On the organization of the Commerce Court the case was transferred here, and—without stopping to note certain intermediate proceedings—it now comes up, on demurrer to the petition in which all parties join, on the general ground that the court has no authority to review the action of the Commission in the premises.

The exact position taken by the Commission with regard to the petitioners' claim for reparation is best shown by what it has to say of it. After finding that the eighty-five cent rate complained of was an unreasonable rate and that seventy-five cents at most was just and reasonable and for two years thereafter not to be exceeded, and having also considered whether the shippers had in fact been damaged, the excess rate as it was contended having been added to the price at which the lumber was sold and paid for by the consumers, which contention was negatived, the Commission, speaking by Mr. Commissioner Prouty, says:

"These complainants were shippers of hardwood lumber to this destination, and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable

rate was in fact exacted. They were thereby deprived of a legal right, and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transportation to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported."

It was thus distinctly found that an unreasonable rate had been exacted by the carrier; that thereby the shippers were deprived of a legal right; and that they had been damaged the difference between what they had been compelled to pay and that which was just and reasonable. And from this it would seem to follow that they were entitled to reparation for that which had thus been unlawfully required of them, the refusal of which relief by the Commission amounted to the denial of a legal right where it should have been upheld. The Commission meets the situation, however, as follows:

"Neither," as it is said in the report, "should these complainants be permitted to slumber upon

their rights and to accumulate against these defendants a claim for damages which may not represent in its entirety an actual loss to the complainants. The burden of an unjust freight rate usually rests upon the consumer, who cannot and does not recover. Claims for reparation should therefore be promptly presented and actively prosecuted. We shall allow the complainants reparation in this case in the amount of the difference between the rate actually paid and the rate of seventy-five cents, which is established and which is found to have been a reasonable rate from the date of the filing of this petition, but, following the case of Thompson *v.* Illinois Central R. R., no reparation will be allowed by reason of shipments made previous to the date of the filing of the complaint."

The Commission, in other words, after finding all the elements of a just and legal claim in favor of the petitioners against the carriers which have intervened, has denied reparation as to anything preceding the filing of the complaint, on the ground that in its opinion the petitioners were guilty of laches. Upon what considerations laches is predicated, other than delay, is not indicated. But without dwelling upon this the fact remains that, in the face of the admitted showing made, reparation was refused as to shipments before the complaint was filed, although allowed after that date, a distinction for which there is no apparent sanction. Having made out a complete *prima facie*

legal claim the petitioners were entitled to have it recognized and sustained to its full extent, and reparation awarded accordingly. No doubt the claim was subject to the limitation imposed by the statute (sec. 16), by which complaints of this character must be filed with the Commission within two years from the time when the cause of action accrues, whatever be the construction given to that provision. *Arkansas Fertilizer Co.* v. *United States,* not yet reported. But there is nothing to sustain the idea that any part of it could be thrown out upon the equitable ground of laches. The plain question presented in every application for reparation is whether the rate which has been charged is reasonable or unreasonable; and if unreasonable, the extent to which it is so. On this both the shipper and the carrier are entitled to an explicit finding; this, if found in favor of the shipper, being the foundation of his cause of action. *Texas & Pacific R. R.* v. *Abilene Oil Co.,* 204 U. S., 437. *Morrisdale Coal Co.* v. *Penn. R. R.,* 183 Fed., 929. *Robinson* v. *Balt. & Ohio R. R.,* decided by the Sup. Ct. Jan. 9, 1912, not yet reported. And, except possibly to determine the shipments to which the rate which is condemned applies, and the number of tons or pounds, or however the freight is measured, in order to get at the gross over payment and award damages accordingly, the duty of the Commission ends with this finding. It can add nothing to the case which is so made out nor

detract anything from it. The prima facie right of the shipper to reparation at the hands of the carrier, with these facts found in the shipper's favor, is thereby established, and the rest is for the courts, in case the order of the Commission is not accepted and complied with. It is not for the Commission to consider and pass upon other questions which may arise, by which the ultimate right to recover may be affected. It does not try out the case on its merits, but only the one particular phase of it. And above all is not the Commission empowered to restrict the operation of a claim in all respects valid on its face upon the supposed applicability of some equitable doctrine, such as laches.

In the present instance the order of the Commission, limiting the reparation allowed to shipments after the complaint was filed, is the result of a clear misapprehension of the law, which renders it invalid. *St. Louis Hay & Grain case,* 214 U. S., 297. *Stickney case,* 215 U. S., 98. *Willamette Valley case,* 219 U. S., 433. *Inter. Com. Commission* v. *Union Pacific R. R.,* decided by the Sup. Ct. Jan. 9, 1912, not yet reported. As already stated, the petitioners, judged by the Commission's own report, apparently made out a perfectly legal claim, not only as to shipments after the complaint but also as to those before it. The right to reparation, in view of this, can not be limited, as has been done, to that which accrued after the complaint was

filed. The petitioners are entitled to go back of that, so far at least as concerns the proceedings before the Commission, until barred by the statute; and to have the merits of their claim considered and passed upon unhampered by any mistaken view to the contrary. The petition therefore on its face sets forth a good case for relief, and there is no ground for the demurrer.

The demurrer will be overruled and the respondents directed to answer over.

United States Commerce Court.

No. 19.—October Session, 1911.

Thompson Lumber Company

v.

Interstate Commerce Commission, respondent; and United States, and Illinois Central Railroad Company, interveners.

ON DEMURRER TO PETITION.

For opinion of Interstate Commerce Commission see 13 Inter. Com. Com. Rep., 657.

Mr. W. A. Percy for petitioners.

Mr. P. J. Farrell for Interstate Commerce Commission.

Mr. James A. Fowler, assistant to the Attorney General, and *Mr. Blackburn Esterline,* special assistant to the Attorney General, for the United States.

Mr. R. Walton Moore and *Mr. Frank W. Gwathmey* for Illinois Central Railroad Company.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[FEBRUARY 13, 1912.]

ARCHBALD, *Judge:*

This case does not differ in principle from that of Russe & Burgess just decided. Indeed the two are linked together by the Commission, the decision in the one on the subject of laches being given as a reason for the decision in the other.

The rate complained of before the Commission was that on hardwood lumber from Memphis to New Orleans for export. The rate charged was twelve cents a hundred pounds, and complaint was made against the Illinois Central Railroad, the Yazoo & Mississippi Valley Railroad, and the St. Louis, Iron Mountain & Southern Railroad, these being the three lines by which shipments of such lumber are made between the points mentioned at the rate in question. The Commission dismissed the complaint as to the St. Louis, Iron Mountain & Southern, but held that as to the Illinois Central and the Yazoo & Mississippi Valley the twelve-cent rate was unreasonable, ten cents per hundred pounds being fixed as the maximum. The Yazoo & Mississippi Valley was not served in the present case and has not appeared, and the case therefore proceeds only against the Illinois Central.

As to the reparation claimed on the ten-cent basis, the Commission said:

"We can not award damages in this case based upon the use of the twelve-cent rate up to the date of the filing of the complaint because of the laches of the complainants and because the record does not conclusively disclose that the rate was unreasonable prior to said date. The questions of law as to the reparation and the amount thereof under the above ruling will be reserved for consideration at a later date."

Not satisfied with the situation in which the case was so left, the petitioners applied for a rehearing and modification of the order, assigning among other things that the Commission erred in the ruling made, it being urged in that connection in the brief filed that there was no place for the application of the doctrine of laches, nor for any limitation other than that imposed by the statute, and that in holding the petitioners to conclusively prove the unreasonableness of the rate prior to the filing of the complaint the Commission was enforcing a degree of proof not justified upon any principle. But notwithstanding this, and with its attention thus called to the matter, the Commission in a further report declined to modify the order. The present bill was then filed, the same as in the Russe & Burgess case, in the Circuit Court of the United States for the Northern District of Illinois, and after the same intermediate proceedings comes up now on demurrer by the Interstate Commerce Commission joined in by the United States and the Illinois Central Railroad intervening.

Nothing need be added to what is said in the Russe & Burgess case on the subject of laches. So far as the action of the Commission in refusing complete reparation is based on the application of that doctrine to shipments which preceded the filing of the complaint, it is clearly invalid.

The other ground assigned by the Commission for its action, in our judgment, is equally untenable. To require conclusive proof of the unreasonableness in the past of the rate complained of was to set up a standard which is exacted, if ever, in only the most extreme cases. "Where an adverse presumption is to be overcome, or, on grounds of public policy and in view of peculiar facilities for perpetrating injustice by fraud and perjury, a degree of proof is sometimes required which is variously designated as 'clear,' 'clear and conclusive,' 'clear, precise, and indubitable,' 'convincing,' 'unequivocal,' &c." 17 Cycl., 771. Conclusive evidence is that which is incontrovertible—that is to say, either not open or not able to be questioned. *Wood* v. *Chapin*, 19 N. Y., 509, 515. Where it is said that a thing is conclusively proved, it means that that result follows from the facts shown as the only one possible. *People* v. *Stephens*, 13 N. Y., Supp., 1112, 1114. Conclusive proof means either a presumption of law, or evidence so strong as to overbear everything to the contrary. *Haupt* v. *Pohlman*, 24 N. Y. Sup. Ct., 121, 127.

In a civil action the complainant is never bound to do more than sustain his case by a preponder-

ance of the credible evidence. *Louis. & Nash. R. R.* v. *Jones,* 83 Ala., 376. *Ford* v. *Chambers,* 19 Cal., 143. *Treadwell* v. *Whittier,* 80 Cal., 574. *Williams* v. *Watson,* 34 Mo., 95. *Strauss* v. *Field,* 90 N. Y., 640. *Crabtree* v. *Reed,* 50 Ill., 206. *McDeed* v. *McDeed,* 66 Ill., 545. *Graves* v. *Cowell,* 90 Ill., 612. To instruct a jury that they must be conclusively convinced is a manifest error. *Hiester* v. *Laird,* 1 W. & S., 245.

In the case in hand it was only necessary for the petitioners to show by a preponderance of proof that the rate in the past—as it was found by the Commission that it would be for the future—was not a just or reasonable rate; and if they did this, it was all that could be required of them. No doubt the Commission had the right to call for proof that was reasonably convincing. But it had no right to array itself against that which was produced, to the extent of holding that it was not conclusive; which was in effect saying that nothing short of what was incontrovertible would satisfy it.

Nor can this be passed over as an inadvertence or as meaning no more than that the evidence so far as concerned the past was not satisfactory. If this was all there was to the case of course nothing could be made of it. But by the petition for a rehearing and the argument that was made in that connection the attention of the Commission was directly called to the effect of the ruling, and after due consideration it was adhered to. If therefore the matter was left in any doubt by the original

report there can be none by the later one. By the express reiteration of the former ruling it was thereby declared, not that the evidence was not satisfactory or unconvincing, but that it was not conclusive, and that none other would be sufficient. This was asking more of the petitioners than was warranted, and the action of the Commission in refusing reparation as to the past upon that ground is invalid.

It is said, however, that the question of reparation was reserved for further consideration, and that there is therefore nothing final. But according to the report the only reservation was of the question of law as to the amount of reparation to which the parties were entitled under the ruling made, which in no respect relieves the situation. As already said in the Russe & Burgess case the petitioners were entitled to have the resaonableness or unreasonableness of the rate in controversy considered and determined fairly and squarely upon the merits, unhampered by any misconception as to the extent or character of proof required of them, and they are now entitled to be relieved from the adverse result under which they rest, which has been brought about by the error complained of. As the case stands they have applied for relief and been put off with only a part of that which they claim, the rest having been ruled out on a clear misapprehension.

The demurrer is overruled with leave to the respondents to answer over.

United States Commerce Court.

APRIL TERM, 1911.

GOODRICH TRANSIT COMPANY, PETITIONER, *v.* THE INTERSTATE COMMERCE COMMISSION, respondent. The United States, intervening respondent.	No. 21.
GOODRICH TRANSIT COMPANY, PETITIONER, *v.* THE INTERSTATE COMMERCE COMMISSION, respondent. The United States, intervening respondent.	No. 22.
WHITE STAR LINE, A CORPORATION, PETITIONER, *v.* THE UNITED STATES, RESPONDENT. THE Interstate Commerce Commission, intervening respondent.	No. 23.
WHITE STAR LINE, A CORPORATION, PETITIONER, *v.* THE UNITED STATES, RESPONDENT. THE Interstate Commerce Commission, intervening respondent.	No. 24.

RALPH M. SHAW, solicitor for petitioners.

J. A. FOWLER, Assistant Attorney General, and CHARLES W. NEEDHAM, solicitor for Interstate Commerce Commission, for respondents.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[OCTOBER 5, 1911.]

HUNT, *Judge:*

No. 21.

The Goodrich Transit Co., a corporation organized under the laws of Maine, filed this bill in equity on December 29, 1910, in the Circuit Court of the United States for the Northern District of Illinois, eastern division, to obtain an injunction against the enforcement of certain orders of the Interstate Commerce Commission. For the sake of brevity, we will hereafter refer to the Goodrich Transit Co. as the transit company, and to the Interstate Commerce Commission as the commission.

It appears from the bill that the transit company has its principal operating office in Chicago, Ill., and since its organization in 1906 has been engaged in the transportation of passengers and freight on Lake Michigan, Lake Huron, and the rivers tributary thereto. It owns and operates steamers and dock properties in Illinois, Wisconsin, and Michigan, several of such dock properties being near the mouths of rivers. The docks are used as landing places, where freight and passengers are discharged and taken off. The steamers carry passengers and freight originating at ports of the States of Michigan, Wisconsin, and Illinois, and destined to ports in each of the said States. This transportation is entirely by water and unconnected with any land

transportation whatever, and is spoken of as "port-to-port" interstate business. The transit company's steamers also carry passengers and freight originating at and destined to ports in the same State, and not passing out of said State en route, and this business is spoken of as "port-to-port" intrastate business.

The bill alleges that the transit company had voluntarily agreed with some of the interstate railroad carriers of the United States to establish certain through routes over which passengers and freight were being carried under joint tariffs, and that for the purpose of establishing such through routes it had voluntarily filed with the commission its joint tariffs or its concurrence in tariffs filed by such railroad carriers, and that the transit company's steamers carry for hire passengers and freight under said joint tariffs over the water portion of said through routes. It is alleged with some detail that the principal part of the business of the transit company is derived from its port-to-port and intrastate business and that competition is active and open to any who may desire to engage in such business, which includes the privilege of the use of docking and terminal facilities. The bill alleges that on June 11, 1910, the commission entered the following order:

It is ordered, That Special Report Series Circular No. 10, prepared under the direction of this Commission by Henry C. Adams, in charge of Statistics and Accounts, be, and the same is hereby, approved;

that a copy of the said Special Report Series Circular No. 10 be sent to each and every carrier by water within the jurisdiction of this Commission; that each and every of the said carriers by water be required to make full and true answers to the several inquiries contained in the said Special Report Series Circular No. 10, and to verify its said answers by the oath of the president or other principal officer of such company, and that the said oath be in the form provided in the said Special Report Series Circular No. 10."

Attached to the petitioner's bill is a copy of the Special Report Series Circular No. 10, referred to in the order of the commission, dated June 11, 1910, to which said special report we shall have occasion hereafter to refer.

Service of the order is alleged to have been made and notification was given that unless answers to the questions propounded in the special report were made before December 31, 1910, the transit company would be liable to the penalties prescribed in section 20 of the act to regulate commerce, as amended by the act approved June 18, 1910.

The petitioner avers that the interrogatories contained in the special report just referred to made no distinction between the business transacted by the transit company, which was solely intrastate business, and that transacted which was wholly port-to-port business, and that which was the result of joint rail and water routes, to which the transit company became a voluntary party; and it is alleged that, inasmuch as the transit company had vol-

untarily become a party to the joint rail and water routes referred to, the commission insisted that it had jurisdiction over all the business of the transit company without regard to its nature or the places between which it was transacted. The bill sets up that since the creation of the commission in 1887, never, prior to the entry of the order above referred to, had the commission required any reports from water carriers generally, or any report of any kind from this particular petitioner.

It is further alleged that the commission, on January 7, 1909, construed the act to regulate commerce as subjecting carriers of interstate commerce by water to the provisions of the act only in respect to traffic transported under a common control, management, or arrangement with a rail carrier.

It is set forth that the inquiries made by the commission were not for the purpose of exacting evidence under any complaint filed for violation of the act to regulate commerce or for the purpose of making investigations that might have been made the object of a complaint; that a large number of the questions propounded in the special report called for pertained solely to the internal affairs of the company, and that it is impossible to answer them without reporting to the commission details in connection with the internal management of the business of the transit company; and it is pleaded that the commission has no constitutional authority to regulate or to inquire into the internal affairs of the transit company, and is without power to regu-

late commerce which is wholly intrastate or to make inquiries respecting commerce which is wholly intrastate.

The order of the commission is alleged to be void because of lack of power in the commission, and because to enforce the order would be a violation of the fourth amendment to the Constitution of the United States, prohibiting unreasonable searches or seizures, and because the information sought by the inquiries is a property right, and because to enforce the order of the commission would be to take the property of the transit company without compensation and without due process of law.

The relief prayed for is an interlocutory order suspending the order of the commission and restraining that body from taking any steps to enforce the order, and that upon final hearing the order of the commission should be annulled. There is a further prayer to the effect that if, however, it should be found that the commission had authority to require an answer to any of the questions contained in the report No. 10, referred to, upon final hearing the court would enter an order specifically designating such questions in said report as the commission could lawfully require to be answered, and that the commission be restrained from attempting to enforce answers to any questions not included in the designation made by the court.

The commission interposed a demurrer, based upon the ground that the bill failed to state any equity. The Circuit Court for the Northern Dis-

trict of Illinois, eastern division, upon December 31, 1910, stayed the order of the commission until the further order of the court.

After the opening of the United States Commerce Court, and pursuant to section 6 of the act to create the said court, the case was transferred, and is now here to be proceeded with as may be proper.

By leave had the United States has intervened and filed an answer, admitting the allegations of fact contained in the bill, but setting forth that the requirements made by the orders of the commission do not make distinction between the books which petitioner might keep and its method of accounting for its income and expenses in connection with its interstate business and its port-to-port business, as separate from its business as a result of its joint rail and water routes, because (1) while the income from each of the different kinds of business stated in the bill can be ascertained with reasonable accuracy, yet it is impossible to determine with any substantial degree of accuracy the expenses incurred in either of them, as separate and distinct from those incurred in the others, and (2) because it is essential that the commission be informed as to the total income derived by the transit company, in order that the commission might determine what are reasonable and just rates to be charged by petitioner in its joint rail and water business, and to determine whether it complies with the provisions of the law regulating interstate commerce.

The United States also sets up that the system of bookkeeping devised by the commission is the result of long experience and well adapted to the preservation of data for the information of the commission, and that in the absence of a method prescribed by the commission a carrier might manipulate its books and reports in a way to conceal rather than to reveal the true state of its business, and that it is of vital importance to the commission to have the information called for in the order in order that it may perform its duties as provided by the terms of the act to regulate commerce.

No. 22.

This suit was also brought in the Circuit Court of the United States for the Northern District of Illinois, eastern division.

The Goodrich Transit Co., the same corporation referred to in case No. 21, after alleging substantially the same matters with respect to its incorporation and business as it had set forth in the averments in the bill filed in case No. 21, alleges that on May 31, 1910, the Interstate Commerce Commission, acting under the authority claimed under section 20 of the act to regulate commerce, approved June 16, 1906, entered two certain orders relating to the subject of a uniform system of accounts to be prescribed for and kept by carriers by water. One of the orders prescribed that the classification of operating revenue of such carriers and the text pertaining thereto, prepared under the direction of

the commission, should govern in the keeping and recording of operating revenue accounts, and that the rules contained in what was known as the first issue of the classification of operating revenues of carriers by water should apply to the keeping and recording of such operating accounts, and that it should be unlawful for any such water carrier or for any person directly in charge of the accounts of such carrier to keep any account or record or memorandum of any operating revenue items except in the manner and form as set forth and prescribed, and except as authorized by the commission.

It was further ordered that any such carrier might subdivide any primary account in the first issue as might be required for the purposes of such carrier, or might make any assignment of the amount credited to any such primary account of operating divisions to its individual lines or estates, provided that a list of such subprimary accounts set up or such assignments made by any such carrier should be first filed in the office of the commission. The order also provided that the carrier, in addition to the operating revenue accounts prescribed by the commission, might keep any temporary or experimental accounts, the purpose of which should be to develop the efficiency of operation, but that such temporary or experimental accounts should not impair the integrity of any general or primary account prescribed by the order of the commission. January 1, 1911, was the date upon which the order was to become effective.

The other order made was with respect to the classification of operating expenses of carriers by water. Classification was to be made pursuant to rules prescribed by the commission and embodied in a printed form known as the first issue. It was ordered that the classification of operating expenses as prescribed should govern in keeping and recording operating-expense accounts, and that the rules prescribed should be those according to which the operating expenses are defined; and the carriers were required to conform to the rules, and it was made unlawful for carriers to keep any accounts or records or memoranda of any operating-expense item except as set forth and prescribed in the manner and form laid down in the pamphlet called the first issue. The carriers were authorized to subdivide any primary accounts as might be required for the purposes of such carrier, or might make certain assignments of the amount charged to such primary account, provided that a list of such subprimary accounts or assignments should be first filed with the commission. Authority was also given to the carrier to keep any temporary or experimental accounts, the purpose of which was to develop the efficiency of operation, but such temporary or experimental accounts were not to impair the integrity of any general or primary accounts as prescribed by the commission, and such temporary or experimental accounts were required to be open for inspection by the commission. The date upon

which this order was to be effective was January 1, 1911.

The petitioner alleges that two pamphlets, one entitled "The classification of operating revenues of carriers by order as prescribed by the Interstate Commerce Commission," etc., and the other of which was entitled "The classification of operating expenses of carriers by water, as prescribed by the Interstate Commerce Commission," etc., were served upon it, and it is alleged that the bookkeeping methods prescribed by the order of the commission differ widely from those used by petitioner, and that in order to comply with the requirements of the commission, petitioner will have to open a completely new set of books and change its methods of accounting, all of which would entail annoyance and expense.

It is averred that the commission has notified the petitioner that, beginning with January 1, 1911, a new set of books must be opened, which must conform to the methods prescribed with respect to all of its business, including its intrastate business, its port-to-port interstate business, and its business as a part of joint routes with rail carriers, and that in the event of a failure to conform its books and methods of accounting to the requirements prescribed, it will be subject to the penalties prescribed in section 20 of the act to regulate commerce.

Petitioner avers that the requirements make no distinction between the books which petitioner may

keep and its method of accounting for its income and expenses in connection with its intrastate business, its port-to-port business, and the business which is transacted by petitioner as the result of the joint rail and water routes to which the petitioner has become voluntarily a party. It is averred that the act to regulate commerce, as amended in June, 1906, conferred upon the commission the same authority that it now claims to exercise with respect to the books and accounts of water carriers generally, and that though petitioner and other water carriers have voluntarily agreed with some interstate carriers by railroad to establish a limited number of through routes over which passengers or property have been transported by a continuous carriage, and have filed tariffs therefor with the Interstate Commerce Commission, yet the commission never before has claimed that petitioner or other water carriers subjected themselves to all of the provisions of the act to regulate commerce or the provisions of section 20 thereof.

It is alleged that under the Constitution of the United States no power was conferred upon Congress to regulate in any method whatsoever the internal affairs of any corporation organized under the laws of a State, and that no power was conferred upon Congress to delegate to the commission the right to regulate in any method whatsoever the internal affairs of any corporation organized under the laws of a State, and that no power was conferred upon Congress to regulate any commerce which is

wholly intrastate, and that Congress did not confer upon the commission the right to regulate all or any part of the business of petitioner which was solely port-to-port business, either interstate or intrastate, and that the commission is without power to prescribe the bookkeeping methods of petitioner with respect either to its intrastate business or its port-to-port business.

Petitioner, while denying that either the Congress or the commission has any authority over the bookkeeping methods of petitioner with respect either to its income or its disbursements, avers that such jurisdiction, if any, as the commission has over the bookkeeping methods of petitioner is limited solely to bookkeeping methods with respect to the income and disbursements of petitioner in connection with its joint rail and water business, and that the methods prescribed by the commission are not reasonably adapted to the purpose of furnishing to the commission any information with respect to the revenue or disbursements of petitioner relating to its joint rail and water business.

It is also alleged that the methods prescribed would not enable the commission to pass upon the justness or fairness of any existing or proposed rate, classification, or practice of petitioner in connection with its joint rail and water business, or in connection with the existence or establishment of any through route, joint classification, or division of receipts upon such joint rail and water business.

It is further averred that it is possible to establish a method of bookkeeping by means of which the income and disbursements from the joint rail and water business of petitioner would be segregated, and that by the methods prescribed in the orders provision is not made for the segregation of the joint rail and water business from the petitioner's port-to-port business or intrastate business.

It is also averred that the right of the petitioner to keep its books in a way which shall seem to it appropriate is a property right, and that the deprivation of such right is a violation of the fifth amendment to the Constitution of the United States.

It is alleged that the orders as made are not regulations of interstate commerce, and that if section 20 of the act to regulate commerce is construed as it has been by the commission it will be the taking of petitioner's property without compensation and without due process of law.

The prayer is that a temporary order may be entered, suspending the orders of the commission, and restraining the commission from taking any steps to enforce the orders, and that upon final hearing decree may be entered annulling and suspending the said orders and enjoining the commission from taking any steps toward the enforcement of said orders. A further prayer is that if, in the judgment of the court, the orders of the commission are lawful in any respect, the court shall say what requirements petitioner shall be obliged to live up to,

and that injunction be issued restraining the commission from enforcing the order with respect to any matters not lawfully included within the order of the court.

The commission demurred to the petition, the demurrer being based upon the ground that the bill failed to state any equity and that the allegations did not show that the legislative department of the Government was without authority to grant the power exercised by the commission in making the orders of May 31, 1910, and that the petition does not show that there is any violation of any constitutional or other right of the petitioner.

The United States filed an answer, admitting every allegation of fact contained in the petition, except as follows: It admits that while no distinction has been made between petitioner's income and expenses in connection with its interstate business and intrastate business, such distinction was not made because while the income from the different kinds of business stated in the petition can with reasonable accuracy be ascertained, yet it is impossible to determine with any substantial degree of accuracy the expenses incurred in either of said kinds of business as separate and distinct from the others, and because it is essential that the commission know the total income derived by petitioner from all its investments and sources, in order that the commission may determine what are reasonable and just rates to be charged by petitioner in its joint rail and water business, and to determine

whether it is complying with the provisions regulating interstate commerce. The answer, while expressly admitting allegations of fact contained in the petition, does not admit but denies inferences of fact from particular facts alleged and conclusions of law insisted upon in the petition.

The Circuit Court of the Northern District of Illinois stayed the order of the commission, and the case, like No. 21, was thereafter transferred to this court.

No. 23 and No. 24.

These are petitions filed originally in this court by the White Star Line against the United States, wherein petitioner attacks the validity of the same orders specified in the two preceding cases, and seeks to restrain their enforcement. The allegations of the petitions are very similar to those already set forth in the petitions of the Goodrich Transit Co. It is averred herein, however, that the White Star Line, in addition to its transportation business, owns two amusement parks, both situated within the State of Michigan; that in connection with the said parks it owns, operates, and derives revenue from lunch stands, merry-go-rounds, bowling alleys, bathhouses, souvenir stands, photograph stands, boat liveries, and launch ferries, and that admission fees are collected from people who enter said amusement parks. The petitioner alleges that the commission had no power to regulate the books or to demand the reports which were kept with respect to the conduct

of its amusement parks, the business of keeping said parks being separate and distinct from the transportation business of the petitioner.

It appears that the White Star Line owns and operates steamers which run from Toledo, Ohio, through Lake Erie, Detroit River, Lake Sinclair, and Sinclair River to Port Huron, in Michigan. The steamers stop to load and unload passengers and freight at many points in the State of Michigan and in the Dominion of Canada, between Toledo and Port Huron. The transportation is entirely by water and unconnected with any land transportation whatever, but it is alleged that the petitioner has voluntarily agreed with some of the interstate railroad carriers of the United States to establish certain through routes over which passengers and freight are carried under joint tariffs, and that for the purpose of establishing such through routes it has voluntarily filed with the commission its joint tariffs or its concurrence in tariffs filed by said railroad carriers, and that the steamers of the petitioner carry for hire passengers and freight under said joint tariffs over the water portion of said through routes.

The orders of the commission, as in the cases Nos. 21 and 22, relate to the making of reports to the commission, and to the keeping of uniform accounts, as required by the rules laid down by the commission, and to which reference has already been made in the statement of the two preceding cases.

48250—S. Doc. 789, 62-2——20

The petitioner in these cases, as in the preceding ones, avers that the commission caused to be served upon it two pamphlets, one entitled "The classification of operating revenues by carriers by water" and the other entitled "The classification of operating expenses of carriers by water." It is alleged that the bookkeeping methods prescribed by the commission differ from those used by the petitioner, and that in order to comply with the order of the commission petitioner would have to open a completely new set of books and change its methods of accounting.

It is also alleged that the requirements include the business of petitioner relating to its amusement parks, its intrastate business, its port-to-port intrastate and international business, and its business as a part of joint routes with rail carriers. Petitioner denies the authority of the commission to make any such orders, and for reasons substantially similar to those relied upon in the bills filed by the Goodrich Transit Co., already referred to, pleads lack of power in the commission, and assails the constitutionality of the orders.

The United States filed answers to the petitions, admitting the allegations of fact contained in the petitions, but alleging that the parks and things connected with the parks constitute a part of the petitioner's general property, and are operated in connection with and for the purpose of promoting its interstate business. The answers also set up that the method of bookkeeping prescribed by the commission is reasonable and just, and that it is impossible to determine what are reasonable and just rates

to be charged by petitioner in its joint rail and water business unless a method of bookkeeping such as is prescribed is put into use.

The Interstate Commerce Commission filed motions to dismiss the several petitions upon the ground that the facts stated therein did not entitle petitioner to any relief.

The four cases were argued together, upon an understanding between counsel for the respective parties that the essential questions were presented by the demurrers and motions to dismiss. The cases were, therefore, heard as upon general demurrers and motions, and without regard to the answers filed by the United States.

This statement is sufficient to an understanding of the cases, and although there are separate records, we shall treat them as if they were but one proceeding before the court.

The commission made its call for the reports and its orders prescribing uniformity of accounts which are objected to by the carriers, under what it claims is authority conferred by section 20 of the act to regulate commerce. The section is appended.[a] Act-

[a] SEC. 20. (*As amended June 29, 1906, February 25, 1909, and June 18, 1910.*) That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act; to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid; the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements

ing under its terms the commission in detail has prescribed classification of operating expenses and reve-

each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the Commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers or carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission

nue accounts for the use of carriers by water and has prescribed that the accounts for the entire operations

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or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the Commission may, in its discretion, issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission, or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States, at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners, who shall have power to administer oaths, examine witnesses, and receive evidence.

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

of such carriers shall be kept according to a uniform system laid out by definite rules of the commission.

In the classification as prescribed for the report, operating expenses are divided into certain general accounts, such as maintenance, traffic expenses, operation of vessels and terminals, incidental transportation expenses, general expenses, and charter expenses. Under these several heads accounts of expenditures are required to be divided into groups and the groups in turn are divided into primary detailed accounts. For example, the report of traffic expenses calls for accounts of superintendence, advertising, fast freight lines, outside agencies, traffic associations, and other traffic expenses. Expenditures chargeable to transportation expenses are required to be divided into general groups under the headings: "Operation of vessels," "Operation of terminals," and "Incidental transportation expenses." Primary accounts which go to make up the items under the general heading are called for with specific detail, to the end that classifications of operating expenses for carriers by water may be presented by an account of the entire transactions of the carrier whose business is being inquired into. The classification of operating revenues is equally specific, requiring accounts of revenue from transportation, revenue from operations other than transportation, and charter revenue. Primary accounts must be kept and made of passenger, baggage, mail, express revenue, and miscellaneous re-

ceipts, including, among many other things, wharf, demurrage, storage, and other receipts.

Interrogatories also call for exact information as to the amount of capital stock issued, dividends paid, surplus funds, if any, funded and floating debt and interest thereon; cost and value of the carriers' property, franchises and equipments, earnings and receipts from each branch of business, and from all sources; operating and other expenses; complete exhibits of financial operations, as well as other complete statements necessary to exhibit the carriers' financial condition and results from operation of their entire business.

In the text of classification of operating revenues in the "first issue" pamphlet, particularly referred to in the petition filed in case No. 22, the carrier is called upon to keep an account of its freight revenue, passenger revenue, excess baggage, and other passenger revenues, together with mail, express, special service, miscellaneous transportation revenues, freight operations other than transportation, rentals of buildings, and miscellaneous receipts. In the classification of operating expenses, the orders require accounts of superintendence, repairs of vessels, renewals, repairs of tugs and lighters, accounts of shop machinery and tools, maintenance of equipment, maintenance of terminals, expenses of docks, wharves, buildings, and fixtures; traffic expenses, transportation expenses, wages of crews, fuel, food supplies, operation of terminals, salaries of agents, clerks, and attend-

ants, stevedore and wharf-laborer accounts, freight losses and damages, accounts of damage to property, salaries and expenses of general officers, law expenses, insurance, charter expenses, including rent, maintenance, and operation accounts for hire or rent of vessels, and other matters.

No attempt is made in the orders making classifications of accounts, and laying down forms, to separate revenues or expenses of operations on traffic which is interstate from that which is intrastate, the object being to require a report of and to prescribe accounting rules for the entire business of any carrier that is subject with respect to any of its traffic to the provisions of the act.

So, without further particularization of the many items of information called for by the questions which are submitted to the carrier in the report, and without examining more closely into the precise methods of the system adopted to secure uniformity of accounts therein, we may put the fundamental question of law presented in this way: What authority, if any, has the commission over water carriers situated as are these now before the court?

At the outset we recognize the force of the suggestion made by petitioners that for a great many years the regulation of commerce on the ocean and other navigable waters, including the regulation of water carriers, has been provided for by laws especially adapted to that particular subject. Thus it was enacted that the liability of owners of vessels for the loss or destruction of property, goods or

merchandise, done, occasioned, or incurred without the privity or knowledge of the owner, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending (Rev. Stat., sec. 4283); and by act of June 26, 1884, amending section 4283, the individual liability of a shipowner is limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. Again, by section 3 of the act of Congress approved February 13, 1893 (27 Stat. L., 446), it is provided that:

* * * if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel * * *."

And in 1873 Congress passed an act which prohibited railways forming part of an interstate line and vessels transporting cattle and other animals from State to State from confining the same in cars, boats, or vessels for more than twenty-eight hours consecutively without releasing the same for water, rest, and feeding for at least five consecutive hours (Rev. Stat., sec. 4386.)

But while these statutory provisions, in so far as they go, are a regulation of commerce and carriage by water and of the limitations upon vessel owners' liabilities passed by Congress under its general power to regulate commerce (*Providence & New York Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S., 578; *Lord* v. *Steamship Company*, 102 U. S., 541), still they do not attempt to control rates, fares, or charges relating to such transportation. And, so far as we are advised, not until April, 1887, the time when the act to regulate commerce became effective, did Congress make reference to the regulation of rates. Upon this assumption we may refer briefly to the history and scope of the act to regulate commerce to see whether Congress, in establishing a system by which interstate transportation should be regulated, included water carriers and charges for service and accounting by water carriers. It is well here to note that by the amendments of the act to regulate commerce passed June 18, 1910, the Interstate Commerce Commission was expressly denied the right to establish any route classification, rate, fare, or charge when the transportation is wholly by water, and that any transportation by water affected by the act to regulate commerce should be subject to the laws and regulations applicable to transportation by water.

Although courts may not refer to the debates in Congress to enable them to discover the meaning of the language of an act of Congress, nevertheless it is proper for them to review the proceedings con-

nected with the passage of a law through the legislative houses, in order to get at the correct interpretation of the text used. (*United States* v. *Trans-Missouri Freight Association*, 166 U. S., 290.)

The initial legislative step taken to secure a law regulating carriers was the adoption of a resolution on March 17, 1885, authorizing the President of the Senate to appoint a committee to investigate into and report upon the subject of "the regulation of transportation by railroad, and water routes in connection or competition with said railroads, of freight and passengers between the several States, etc." On January 18, 1886, the committee made an exhaustive report wherein were pointed out the then existing evils in railroad operation, together with possible remedies therefor, and a bill was recommended for passage. In the report special emphasis was laid upon the influence of water routes as beneficially regulating charges made upon all other means of transit, the conclusion of the committee being that in order "to secure the blessings of cheap transportation and to hold our place among the nations of the earth, we must develop our natural waterways to their fullest capacity and give the benefits of lake, river, and canal communication to the people of all the States as far as practicable." The law as approved February 4, 1887, to be effective April 5, 1887, contained the following paragraph, numbered 1:

"* * * That the provisions of this act shall apply to any common carrier or carriers engaged

in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

Amendments to this section made in June, 1906, removed doubt as to what constituted the test of jurisdiction by changing the punctuation so as to make the provisions of the act apply to "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or ship-

ment), from one State or Territory" etc. The effect of the parentheses was to make the words "common control, management, or arrangement" applicable only to transportation which is partly by railroad and partly by water. We do not regard the change as of special importance to this case further than that it shows that Congress consistently meant to keep within the transportation over which it would exercise a measure of control, to wit, not alone interstate traffic by all-rail route, but interstate traffic in part by water when used in connection with rail under a common control, management, or arrangement for a continuous carriage or shipment.

It is undoubtedly true that in the exercise of its power over interstate commerce the principal moving thought of Congress was to regulate railroad corporations. Commonly known practices of unjust discrimination in various forms by railroads had led to many evils, which owing to the restricted powers of the States could only be effectively dealt with through general law. The decision of the Supreme Court in *Wabash, St. Louis and Pacific Railway Co.* v. *Illinois* (118 U. S., 557), rendered in October, 1886, to the effect that a statute of a State attempting to regulate or to impose any restriction upon the transmission of persons or property from one State to another is not within the class of legislation which the States may enact in the absence of legislation by Congress, and that such a statute is void even as to that part of such transmission which may be within the State, revers-

ing the decision of the Supreme Court of Illinois, helped to draw public attention to the situation and quickened the demand for congressional action.

Mentioning the causes which led to action by Congress, the Supreme Court, in *Texas and Pacific Railway Co.* v. *Interstate Commerce Commission* (162 U. S., 197, 210), said:

"* * * They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, they are so practically. The demand for speedy and prompt movement virtually forbids the employment of slow and old fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities.

Some of these mischiefs were partially remedied by special provisions inserted in the charters of the

companies and by general enactments by the several States, such as clauses restricting the rates of toll, and forbidding railroad companies from becoming concerned in the sale or production of articles carried, and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers—particularly that one which requires uniformity of treatment in like conditions of service.

As, however, the powers of the States were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result."

On the other hand, as has been pointed out by the Supreme Court, in referring to the act to regulate commerce, the purpose of Congress was to embrace the whole range of interstate commerce, and this is made apparent by the exclusion only of domestic commerce in the last clause of the first paragraph of section 1, and in the declaration of the scope and purpose of the act announced in the title. (*Armour Packing Co.* v. *United States,* and other cases, 209 U. S., 56.) Now, of course, steamers which undertake for hire to transport the goods of those who may choose to employ them from place to place are carriers (*Niagara et als.* v. *Cordes,* 21 How., 7); and undoubtedly whenever as carriers they enter

upon the transportation of freight or passengers and are used under a common arrangement with a railroad for a continuous carriage of passengers or property from one State to another State they are brought within the purview of the first section of the act.

As there is involved in the opinion just expressed construction of the words "when both are used under a common control, management, or arrangement for a continuous carriage," etc., it is appropriate to consider them for a moment. It is apparent that by failure in terms to include them, water carriers doing business as are the steamers belonging to petitioners herein, are not directly in any way subject to the act unless their connection with railroads and their uses under certain arrangement with railroads make them so; that is to say, water carriers situated as are these petitioners are exempt from the provisions of the act in respect to their intrastate port-to-port business and their interstate port-to-port business. Indeed, there is no real contention otherwise, and it would therefore follow that the commission has no control over any business done by these petitioners except such interstate traffic as is carried on under a joint arrangement between them and rail carriers.

But we were told upon the argument that through bills of lading covering part railroad and part water transportation under joint tariffs are issued by the petitioners. Moreover, under the pleadings we must take it as a fact that for the purpose of

establishing certain through routes petitioners have filed with the Interstate Commerce Commission their joint tariffs, or their concurrence in tariffs filed by the railroad companies, and that the petitioners' steamers carry for hire passengers and freight under said joint tariffs over the water portion of the through routes. These things being true, we find it impossible to escape from the conclusion that there is engagement in transportation in so far as both water and rail are used to carry from one State to another, and there is a common arrangement made as described for a continuous shipment of passengers and freight whereby petitioners have brought themselves within the terms of the act and are subject to such of its provisions as are applicable to carriers under such arrangement.

Let us see what the practical view of the commission has been where the subject of use and arrangement has been adverted to.

In the matter of *Joint water and rail lines* (2 I. C. C. R., 645, 646–647) the commission observed:

"* * * that carriers by water are not in terms brought under the regulation of the act to which carriers by rail are subject except 'when both are used under a common control, management, or arrangement for a continuous carriage or shipment,' etc. If the carriers by water see fit to operate independently, no authority is conferred upon the Commission to compel them to do otherwise, and the understanding of the Commission is that by the Act to regulate commerce the carriers by rail are also left at liberty to act independently. They can-

not decline to receive from or deliver freight to connecting water lines; but at the same time they are not required by law to make with the water lines joint rates, though they should be expected to do so when they can thereby subserve the interest of the public without detriment to their own interests. * * *"

In the third annual report of the commission the relation of lake and rail transportation received careful consideration (3 I. C. C. R., 289–381). It was commented upon that the act was only applicable to water transportation when used under a common control, management, or arrangement for a continuous carriage or shipment in connection with a railroad and as part of a line or route of which another part is a railroad; and that carriers engaged in transportation wholly by water were independent of regulation. The commission deplored such a condition. Special reference was made to traffic upon railroads from the Lakes to the Atlantic coast where the boats were used in connection with a rate under a common control or management, for continuous carriage from Chicago, Duluth, and other western lake ports to tidewater at New York, Philadelphia, and other eastern cities. It was stated by the commission that such carriers on lake and rail were made subject to the act and were required to publish their rates and charges together with proposed increases or reductions.

In the case of *The Railroad Commission of Florida* v. *The Savannah, Florida & Western Railway Co. et als.* (5 I. C. C. R. 13), a question involved was

whether some of the defendant steamship companies and a certain railroad company were common carriers engaged in interstate commerce and subject to the jurisdiction of the commission. It was held that while the steamship companies constituted all-water lines, inasmuch as they were each engaged in connection with the railroads in the transportation of oranges from points in Florida to northeastern cities under through bills of lading, and inasmuch as they joined in the action of the various railroads and steamship lines in advancing certain rates under investigation, under the act and the former decisions of the commission the companies were carriers of interstate commerce and subject to the jurisdiction of the commission in respect thereto.

In the matter of *Jurisdiction over water carriers* (15 I. C. C. R. 205), the commission again had occasion to give consideration to the question, which was stated in this way:

"* * * Does the fact that a water carrier joins with a rail carrier in forming a through route or establishing a joint rate for the transportation of certain traffic subject all the interstate traffic of such water carrier to the requirements of the act and the jurisdiction of the Commission; or, stated in a narrower form, does such action on the part of a water carrier subject its port-to-port traffic to all the provisions of the act, including the posting and observing of tariffs and similar requirements?"

The language of section 1 of the act, as we have heretofore quoted it, was carefully examined, and it was held that while interstate commerce wholly

by railroad was subject to the act, interstate commerce wholly by water was not; yet it was said, "It is equally obvious that interstate commerce partly by railroad and partly by water, under a common control, management, or arrangement for a continuous carriage or shipment, is subject to the act." The commission then proceeded to determine whether under conditions where some of the commerce transported by a carrier is subject to the act all the commerce transported by such carrier was also within the act; and the view taken was that the statute was only applicable to a common carrier or carriers engaged in transportation partly by rail and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment. Judge Knapp, then chairman of the Interstate Commerce Commission, said:

"The use of the word 'when' is significant, and its natural meaning seems to be that a water carrier is subject to the act 'in so far as' or 'to such extent as' it carries traffic under a common control, management, or arrangement with a railroad." Regulation of charges exacted upon the port to port business of water carriers was held not to be authorized, and reasons were pointed out why any other construction was unreasonable. For example, it was observed that if one water carrier, by becoming a party to a joint rate with a railroad, was thereby required to publish and adhere to its rates between ports it could not hope to compete with a

carrier not required to publish and maintain its rates, which would bring about a result whereby the law, instead of promoting and facilitating commerce, would tend rather to its injury by making unprofitable the instrumentalities provided for the carriage of that commerce. It was shown that under such a construction of the law there might be two water carriers between the same ports attempting to secure the transportation of competitive traffic, one of which would be bound to observe and collect rates which it had published thirty days in advance, while the other could make any rate which would secure the traffic. Nevertheless water carriers were held to be subject to the law as to such interstate traffic as is transported under a common control, management, or arrangement with a rail carrier.

Judicial construction accords with these views. In Ex parte *Koehler, Receiver, etc.* (30 Fed., 867), decided in April, 1887, though the facts were unlike those before us, the court in its discussion of the interstate commerce act thought that it did not apply to all of the agencies or instrumentalities used or engaged in interstate commerce; that it did not include any water craft unless used in connection with the railways under a common control, management, or arrangement for a continuous carriage or shipment, etc., and said:

"The mere fact that a railway wholly within a State and a vessel running between said State and another meet at a point within the railway State

and thus form a continuous line of transportation between the two States by the one taking up the goods delivered by the other at its terminus and carrying them thence to their destination, does not bring the carriers who so use the railway and steamer within the act. So long as the railway and steamer are each operated under a separate and distinct control, making its own rates and only liable for the carriage and safe delivery of the goods at the end of its own route, the act does not apply to the transaction. To make these carriers subject to the act the railway and vessel must, as therein provided, be operated or used under a "common control"—a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one.

A fair implication from this language is that where there is an arrangement and a use by both water and rail carrier under an arrangement by bill of lading given for carriage over both routes the carriers are within the act.

In *United States* v. *Wood et al.* (145 Fed., 405) the court held that the test of subjection to the act was through routing in interstate commerce, and that when one carrier united with one or more in making a rate for interstate traffic and issued a through bill therefor it became subject to the act, and that the successive receipt and forwarding in the ordinary course of business by two or more carriers in interstate traffic under through bills, or under any arrangement for continuous carriage over their lines, constituted assent to such common arrangement for the carriage within the meaning of the act. (See

also *United States* v. *Camden Iron Works*, 150 Fed., 214.)

In *United States* v. *Colorado & N. W. R. Co.* (157 Fed., 321) the Court of Appeals of the Eighth Circuit adverted to the applicability of the act to carriers partly by water and partly by railroad operating under a common control, management, or arrangement, and referred to the amendatory act of June 29, 1906, as governing common carriers engaged in interstate commerce wholly by railroad, even though they are exempt from any common control, management, or arrangement with other carriers.

Going to the highest authority we find like general construction and definition of what will be looked upon as a common arrangement.

In *Cincinnati, New Orleans and Texas Pacific Railway Co.* v. *Interstate Commerce Commission*, and *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Railway Co.* (162 U. S., 184), it was said:

"* * * But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the Federal act, in respect to such interstate commerce. We do not perceive that the Georgia Railroad Company escaped from the supervision of the Commission by

requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the State of Georgia when the goods were shipped to local points on its road. It still left its arrangement to stand with respect to its terminus at Augusta and to other designated points. Having elected to enter into the carriage of interstate freights and thus subjected itself to the control of the Commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road and exclude other points.

* * * * *

* * * All we wish to be understood to hold is, that when goods shipped under a through bill of lading, from a point in one State to a point in another, are received in transit by a State common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. When we speak of a through bill of lading we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested.

The principle of this last case is to be invoked because the petitioning water carriers before us ship goods under through bills of lading from points in one State to points in another under traffic arrangements with railroads for continuous carriage or shipment. They have thus chosen to make an arrangement, presumably according to the usual method in use by connecting carrying companies, and so have subjected their boats in respect to such interstate

carriage to the control vested in the commission, and are carriers subject to the act.

The learned counsel for the petitioners admitted upon the argument that the two carriers, rail and water, could not disregard the long and short haul provision of section 4 of the act under circumstances where an all-rail carrier could not; but his suggestion was that a reasonable interpretation of the law might be that inasmuch as railroads are subject to the act, and inasmuch as a rail carrier can do nothing by itself or with another railroad or with a water carrier which can not be reached by act of Congress, the remedy for a violation of the law in respect to traffic carried by water carrier under common arrangement, except as to rebates, may be found by dealing with the rail carrier only, and which alone may be liable. This argument must needs find support in some construction of the text whereby water carriers are exempted, even though operating in interstate traffic under an arrangement with a railroad for a continuous shipment. It therefore involves limiting the term "common carrier" embraced in section 1 to railroads entering into arrangements with water carriers, and so confines authority conferred by section 20 to inquiry into the carriage concerns of the railroad only. The words of the statute, however, do not so restrict the common arrangements for use. They include any common carrier or carriers engaged in transportation of passengers or property partly by railroad and partly by water, and thus have that broader scope which the commission has time and again regarded them as having;

and which upon careful examination we believe to be in accord with the spirit as well as the letter of the law.

Regarding the petitioners, therefore, as subject to control, we nevertheless must not overlook limitations which are incidental to the subjection as well as to the regulating power.

As we have already seen, the subjection is at once restricted for the reason that the intrastate port to port business and the interstate port to port business of the petitioners are outside the purview of the act of Congress; so we can advance to a consideration of whether or not the regulating power is limited by section 20.

The contention of the Government here is that the commission is authorized to call for full reports of the entire business of these petitioners, intrastate as well as interstate, while petitioners say that no such authority is given or could be given.

The broad object of section 20 evidently was to clothe the commission with authority to call for any and all information which would enable the commission to act intelligently in the lawful exercise of its delegated power of rate regulation. Of course, without some precise knowledge of traffic conditions and of interstate business, the reasonableness of rates and fares relating to such business would be impossible of determination. But Congress has expressly restricted the authority to call for reports and to prescribe the form of such reports to common carriers subject to the provisions of the act. It is

impossible to read section 20 as independent of section 1 imposing this limitation. And inasmuch as the act has only to do with interstate commerce and carriers engaged in interstate commerce, only such carriers can be included within those which must respond to the calls for information and comply with the requirements of the commission in matters of accounting. This being true, inasmuch as the reports of affairs, accounts, finances, and like things of the carriers are evidence for the ascertainment of facts relating to the interstate business, which alone is the proper subject of regulation, the scope of the right to call for the report is confined by the nature of the business to be set forth within the report when made. As a correlative proposition, the obligation upon the carrier, subject to the provisions of the act, is to report such business as is interstate and not exempt, and under section 20 there is no obligation upon it to report other business.

Furthermore, the act only confers the right to prescribe how accounts of business properly the subject of regulation shall be kept, and no duty rests upon the carrier to obey orders prescribing methods or forms of accounting except for such business. It is said by the Government, however, that conceding lack of power to regulate any commerce except that which is carried on under common arrangement, nevertheless the interstate and intrastate operations of these water carriers, petitioners, are so commingled that it is impractical to obtain information of the interstate traffic with-

out full knowledge of the intrastate concerns. The answer to these suggestions is in the text of the law, which expresses the mind of Congress and limits all authority to the regulation of carriers subject to the provisions of the act, and which in this case are those engaged in transportation of a particular nature; that is to say, interstate, partly by rail and partly by water, used under a common arrangement as already defined.

We recognize that section 20 relates to reports by carriers rather than to the carriage itself, but the power to call for the information in the report is circumscribed by the relation of the report to the thing itself, interstate traffic. A like rule must govern with respect to bookkeeping and accounting methods. The commission, in the exercise of the power to establish a uniform system of accounting, can only lay down forms and rules which relate to the subject itself, interstate traffic not exempt.

It may be that difficulties will arise which will make it hard for the commission to confine its inquiries into interstate business done under arrangement with the rail carrier and to prescribe systems of keeping books and accounts without impinging upon matters which are intrastate exclusively, and it may be a somewhat tedious work for the carrier to furnish this information and to follow the system of accounting; but as Congress has seen fit to exercise its authority with respect to that which is interstate, mere perplexities of fram-

ing the interrogatories or of accounting, or recording the evidences of such transactions can not be urged as a reason for refusing to sustain the power conferred. Nor does it seem logical to say that if the business is so far separable as to furnish a basis for a common arrangement as to part of it that report and systematic account of such part can not be had without report of the whole.

It is fitting at this point to repeat that the reports and the methods and forms contemplated under section 20 are for the information of the commission and for the simplification of furnishing such information. But we must not confuse such reports with information sought under an investigation undertaken by the commission upon complaint or of its own motion. In the one instance the commission calls for facts necessary to the general performance of a duty imposed upon it; in the other it exerts its power to obtain evidence necessary to enable it to decide a question involving something like an issue. The information by report being directly pertinent to the substantive subject of what is interstate commerce, and this being the proper subject of regulation, presumably will be furnished by the carrier in truthful and honest statement.

If, however, the report of the carrier is not accurate or truthful, or the information furnished is not sufficiently complete to enable the commission to perform its duty, there are ways by which investigation can be had and which, if pursued,

clearly may render it proper for the commission, in its effort to get at the truth of the interstate business of the carrier, to inquire fully into its intrastate business—not with a view of exerting power over such intrastate business, but because inquiry into such business is essential in order to know the true condition of the interstate business. Such a contingency, however, is not presented upon first motion under section 20, nor does the right to obtain such necessary information carry with it the right of investigation into business not interstate and not directly connected therewith. For instance, it would seem to be relevant in the Goodrich cases to inquire into the amount of capital stock, debts, value of franchises, improvements, receipts, dividends, and such other matters pertinent to the business of the corporation as Congress evidently regarded to be foundation knowledge for the commission to have; but, as far as appears in the record in cases 23 and 24, there is no necessity for going into the details of the amusement-park business carried on by the White Star Lines, for it has no relation to interstate traffic.

It is a circumstance of slight force, but deserving of mention as in line with these observations, that nowhere in section 20 is there reference to "investigation" by the commission. "Reports" containing "information" may be required and forms of accounts, records, and memoranda may be prescribed—even inspection and examination of accounts, records, and memoranda may be had by

examiners of the commission—but they are always for purposes of information.

Information of interstate traffic business and power to make the carrier report it by a uniform system of accounting are the keynotes of section 20. "Investigation," on the other hand, is the word employed in parts of section 12, authorizing depositions in proceedings before the commission; investigation is authorized where complaint is made or where questions arise as provided for by sections 13 and 15 of the act. Reports of "investigations" are to be made (sec. 14), and attorneys may be employed for proper representation of the public interests in "investigations" made by the commission, or proceedings pending before it or in court.

These considerations make it reasonable to construe the power given by section 20 as one pertaining to first information, ample presumably to secure necessary facts to enable the commission to go forward, yet not broad enough in initial proceeding to warrant inquisitorial investigation into collateral affairs, which of themselves do not constitute interstate commercial traffic or are not necessarily directly interwoven therewith.

Under this view of the power conferred upon the commission by section 20, it is very clear that the authority to require the reports of interstate business where there is the use under a control as prescribed is granted. In *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission* (decided May 29, 1911), the railroad company

brought a bill to annul an order of the commission requiring the railroad company to make monthly reports showing the instances where employees subject to the act of Congress of March 4, 1907 (Chap. 2939, 34 Stat., 1415), had been on duty for a longer period than that allowed. The contention of the carrier was that the commission had no authority to require the reports called for. The Supreme Court examined section 20 of the act to regulate commerce and held that a grant of power extended to the commission in the execution of the act whereby they could order carriers to file monthly reports of earnings and expenses and to file periodical or special, or both periodical and special, reports concerning any matter about which the commission is authorized or required by law to inquire or keep itself informed, or which it is required to enforce, etc., clearly embraces the power which the commission had there asserted, and authorized it "to promulgate an order requiring reports to be made." But it appears that the court limited its observations to interstate business and was careful not to construe the law as extending the power beyond the right to make the order requiring reports of such business.

From these expressions it follows that the theory of the commission in the present cases was erroneous. It acted within its authority when it made an order calling for reports of all business done by the petitioners under through bills of lading where the transportation was partly by railroad from one

State to another, or from one place in the United States to Canada, an adjacent foreign country; and it was within its power when it prescribed the system of accounts and the uniform method of keeping accounts for such interstate business; and so far as the orders call for information confined to such traffic, or directly related thereto, and so far as the orders prescribe uniform systems of bookkeeping and accounting for such traffic and such as is directly related thereto, they must be sustained. But, in so far as the reports called for and the accounting rules prescribed extend beyond such interstate business of the carriers, or include matters of intrastate traffic accounts and affairs and concerns exclusively, they become invasions of the rights of the carriers, and to the extent of such invasions are unlawful.

What we have said makes the conclusion of the case comparatively simple.

Petitioners are amenable to the law with respect to all interstate business done by them in connection with railroads under arrangements such as have been discussed, and the commission acted within its authority when it made orders for reports with respect to such business and prescribed forms of accounting for such business; but it went beyond its authority in calling for reports of transactions relating exclusively to "port to port" interstate business, or to intrastate traffic or affairs, and in propounding

questions and prescribing bookkeeping and accounting methods in respect thereto.

A recast of the forms of reports should be made by the commission, acting in conformity with the views herein expressed. We think it advisable that the commission, rather than the court, should proceed to make the recast.

The demurrers are overruled and the motions to dismiss are denied; and the prayers of the petitioners for orders of injunction are granted. The orders issued by the commission are hereby set aside, and the matter is referred to the commission to be proceeded with as may be proper under the law as herein indicated. So ordered.

United States Commerce Court.

No. 25.—MAY SESSION, 1911.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and Omaha & Council Bluffs Railway & Bridge Company, petitioners,

v.

INTERSTATE COMMERCE COMMISSION, RESPONDENT.
The United States, intervening respondent.

ON BILL AND DEMURRER.

For opinion and order of the Interstate Commerce Commission, see 17 I. C. C. Rep., 239.

For opinion of Circuit Court granting preliminary injunction, see 179 Fed., 243.

Mr. John Lee Webster, for petitioners.

Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.

Dr. Charles W. Needham, for Interstate Commerce Commission.

Before ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[October 5, 1911.]

MACK, *Judge:*

The Omaha & Council Bluffs Railway & Bridge Co., hereinafter referred to as the bridge company, an Iowa corporation constructed, under authority of an act of Congress (act Mar. 3, 1887, 24 Stat., c. 356, p. 501), and now owns a joint railroad, wagon, and foot toll bridge over the Missouri River at Omaha, Nebr., and Council Bluffs, Iowa, and also owns a railway, which begins at the west end of the bridge in Omaha, Nebr., and extends eastward across the bridge to Council Bluffs, Iowa. The bridge company also owns the stock and bonds of the Omaha, Council Bluffs & Suburban Railway Co., a street railway line in Council Bluffs. The Omaha & Council Bluffs Street Railway Co., hereinafter referred to as the street railway company, owns and operates all of the street railway lines in Omaha, Nebr., in addition to which, in January, 1903, it leased all of the properties of the bridge company for a period of years, so that it now operates all of the lines of both systems.

Foot passengers pay 5 cents bridge toll; local street car fare in either city is 5 cents; interstate street railway passengers pay no direct bridge toll but a single fare of 10 cents, or $1.50 for 30 commutation tickets, for a ride to or from any point on the line in Council Bluffs, except Courtland Beach, over the bridge from or to any point on the line of the street railway company within the so-called loop in Omaha. Interstate passengers to or

from a point in Omaha beyond the loop receive no transfers, but according to the practice sought to be corrected are required to pay an additional local fare of 5 cents. The loop district in Omaha extends westward on Douglas to Fourteenth Street, south upon that street to Howard, east to Eleventh, north to Douglas, and eastward back to the bridge.

On complaint the Interstate Commerce Commission refused to reduce the 10-cent fare to 5 cents, but abolished the loop limitation in Omaha, ordering the bridge and street railway companies not to charge more than 10 cents to or from any point on the line in Omaha from or to Council Bluffs, except Courtland Beach. The report of the commission will be found in 17 Interstate Commerce Commission Reports, 239. A bill was thereupon filed in the Circuit Court of the United States for the District of Nebraska, and a preliminary injunction was granted against the enforcement of this order. (*Omaha & C. B. St. Ry. Co.* v. *I. C. C.*, 179 Fed., 243.) The case was subsequently transferred to this court and is now up for disposition on a demurrer to the bill, except as to one paragraph, which is answered by adding to the order of the commission its report, thus making the latter a part of the record.

On the oral argument, though not in the briefs, it was suggested, in accordance with the charges of the bill, that the order of the commission, in practically compelling the street railway company to give transfers in Omaha, went both beyond the issues in the case before the commission and beyond its constitu-

tional as well as its statutory powers in that it thereby attempted to regulate the strictly intrastate affairs of the street railway company by an order which had no reference to the transportation over the bridge, but to what should happen after it was complete, compelling the company in effect to render an additional service without compensation. But the complaint before the commission was that the 10-cent fare between Council Bluffs, Iowa, and Omaha, Nebr., was unreasonable and unjust, and it was prayed that the defendants be required to make and fix passenger fares to apply in future to the transportation of passengers from Council Bluffs to Omaha, and the reverse, which should not exceed 5 cents per passenger or such charge as the commission should find reasonable and just. The report recited that the complainant assailed the 10-cent fare between the two cities over the bridge as unreasonable and prayed that "no extra charge be made when in the course of interstate transportation passengers are carried over such bridge," and the establishment of a 5-cent fare.

While the primary object aimed at was the reduction of the 10-cent fare to 5 cents, the prayer for the abolition of all extra charges and the fixing of a reasonable rate for interstate passenger transportation between the two cities fairly included, in our opinion, the elimination of the loop boundary for the 10-cent fare. Moreover, the commission expressly states in the report that "the reasonable-

ness of confining it (the 10-cent fare) to points on the loop is put in issue in these proceedings."

The lines from the bridge in Omaha to and through the loop do not constitute a system separate and distinct from those beyond the loop. Both are under the common ownership, control, and operation of the street railway company. Local passengers pay a single fare within the city of Omaha between all points, receiving the necessary transfers at junction points to and from the loop.

The question presented was, therefore, not whether an independent company operating solely in Omaha beyond loop points and exchanging transfers solely for local passengers with an interstate company operating the loop lines could be compelled to give transfers to interstate passengers as well—as to which we intimate no opinion—but whether or not the interstate company, operating all the lines as one system, the parts of which are independently operated only in a physical sense, in that transfers are necessary from and to the loop, could be compelled, without additional compensation, to carry an interstate passenger to a point on its own lines beyond the loop district; in other words, whether 15 cents is or is not a reasonable fare to be paid for the entire interstate journey made on the several lines operated by the street railway company. So stated, the question is obviously one of the reasonableness of interstate passenger rates, and as such clearly within the jurisdiction of the commission, if

it has any jurisdiction over corporations such as the street railway company.

Complainants do, however, allege—and this brings us to a consideration of the principal and important question in the case—that the Interstate Commerce Commission, under the act, has no jurisdiction over interstate passenger rates charged by a corporation engaged in the business in which the street railway company is engaged here.

The judges of the Circuit Court before whom the case originally came, in granting a preliminary injunction, held that the complainants were street railway companies engaged in operating street cars for passenger transportation, and not commercial railroad companies engaged in the general transportation of freight and passengers, and as such did not come within the class of corporations over whose rates the Interstate Commerce Commission has been granted jurisdiction. The cases cited in support of this view involved the interpretation of various State acts establishing commissions, regulating taxes, providing for joint rates or connections, giving mechanic's liens, abolishing the fellow-servant rule, or in other ways dealing with railroad problems. Under these statutes it was held that inasmuch as commercial railroads and street railways were classified separately by the legislatures, electric street railways would not be deemed to be embraced within the general term "railroad" as used in such acts. The principal of these cases, which cite the others, are *R. R. Commission* v. *Market Street R. R.*

Co., 132 Cal., 677 (65 Pac., 1065) and *Sams* v. *St. Louis, etc., Ry. Co.*, 174 Mo., 53 (73 S. W. Rep., 686). In each of these there was a vigorous dissenting opinion.

No court decision has been found directly involving an interpretation on this point of the Federal act to regulate commerce, although in the *Employers' Liability cases* (207 U. S., 463, at 497) Mr. Justice (now Chief Justice) White said: "From the first section it is certain that the act extends to every individual or corporation who may be engaged in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridge, wagon lines, carriages, trolley lines, etc."

The conclusion of the Interstate Commerce Commission that it has such jurisdiction is supported by its earlier decision in *Willson* v. *Rock Creek Ry. Co.* (7 I. C. C. Rep., 83) and by its later decision in *Beall* v. *Washington, Alexandria & Mt. Vernon Ry. Co.* (20 I. C. C. Rep., 406). While two commissioners dissented as to the jurisdictional question in the *Rock Creek Ry. Co.* case in 1897, all concurred in the order which is sought to be enjoined in the present case, Prouty, C., speaking as well for Commissioners Knapp and Cockrell as for himself, making the following statement: "In *Willson* v. *Rock Creek Ry. Co.* (7 I. C. C.

Rep., 83) I expressed the opinion that the act to regulate commerce did not apply to ordinary street railways. I still entertain the same opinion, but a majority of the commission thought otherwise in that case, and for the 12 years since we have uniformly adhered to that holding. It seems to me that this should be accepted as the settled law for this body until reversed by a majority of the commission or disapproved by a court of competent jurisdiction."

The fact that the opinion of the majority of the commission in the *Rock Creek Railway Co.* case has been acted on for so many years should compel us to hesitate before adopting an interpretation of the act contrary to that of the commission. On the other hand, the opinion of such experienced judges as granted the preliminary injunction in the present case and the doubts of our colleague, the presiding judge of this court, while chairman of the commission, and of his two associates, necessitate a careful examination of the question in the endeavor to ascertain whether or not, even though certain words literally construed may be held to grant the jurisdiction, a reasonable interpretation of the entire act, in the light of its history and of the evils sought to be remedied and of the later amendments, supports the literal construction; in a word, whether sound interpretation of both the spirit and the letter of the statute sustains the jurisdiction of the commission.

There is no question that Congress could have granted jurisdiction over interstate street railway companies carrying only passengers. Neither is it controverted that, under the act, the commission has jurisdiction over some corporations engaged in interstate transportation of passengers alone, as well as over some corporations engaged in interstate transportation using electricity instead of steam as the motive power. But it is argued that, as the act itself shows, Congress never intended to exercise its power of regulation over all persons or corporations engaged in interstate transportation (having expressly excluded water carriers, for instance, except where operating in direct connection with a railroad under a common arrangement for continuous carriage); that the evils which compelled the intervention of Congress were due to the acts and omissions of the great railroad systems; that street railways in 1887 were ordinarily purely local and municipal, operated mostly by animal power and fully regulated by municipal ordinances; that many of the provisions of the act are entirely inapplicable to street railways; that commercial railroads, operated ordinarily by steam and vested with rights of eminent domain, are generally differentiated in legislation from street railways operated to-day ordinarily by electricity, generally not endowed with the right of eminent domain, and running usually upon city streets and public highways and not on private property; and that for these, as well as for other reasons, electric interurban

passenger street railways are not included within the classes of common carriers over which jurisdiction was granted by section 1 of the act. The relevant part of this section as it was in force when these proceedings were begun in the Circuit Court is copied.[1]

Intermediate between the ordinary urban street railways which, in the case of cities or towns near each other, whether in the same State or not, become State or interstate interurban surface railways carrying only passengers, and the commercial railroads carrying passengers and freight and operated usually by steam, are the so-called interurban electric roads. These have been organized,

[1] SEC. 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columiba to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent country: *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of the property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this act shall include express companies and sleeping-car companies. The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.

or at any rate have become important factors in transportation, since 1887. They usually carry mail, express matter, and some freight as well as passengers, and do not only a local business in more than one city and between cities but also between city and country. It is conceded by counsel that corporations operating such roads, even though differing in many respects from so-called commercial railroads, come within the jurisdiction of the commission when engaged in interstate transportation. The commission so held in *C. & E. Elec. R. R. Co.* v. *I. C. R. R. et al.* (13 I. C. C. Rep., 20) and *C. & C. Traction Co.* v. *B. & O. S. W. R. R. Co.* (20 I. C. C. Rep., 486). In Nebraska and some other States corporations operating such interurban roads are, moreover, created under the general railroad acts.

The present street railway company differs from this class of interurban roads in that it is created under the street railway act of Nebraska; it does not and is not empowered to carry freight; and, moreover, unlike some interurban roads, it has no right of eminent domain. Like these, however, it carries mail; it serves not one but two cities and several towns, villages, and resorts; and though the bill of complaint alleges that the rails of the street railway company are all on streets and highways, it does not deny the statement in the report of the commission, referring probably to the leased lines of the bridge company, that the rails are not all laid in streets and highways, but for some distance

run over private right of way and over the bridge across the Missouri River.

While, as complainant urges, the Nebraska corporation is the only party actually affected by the order, nevertheless the order is directed against it not in relation to its business as a local Nebraska street railway corporation, but to its business as a carrier engaged in interstate transportation. As such carrier it is the successor of the Iowa corporation, the bridge company. Whatever may be the latter's charter limitations as an Iowa corporation, it erected the bridge and the lines thereon (both now leased to and operated by the street railway company) under power granted to it by Congress to construct, operate, and maintain the bridge and a "steam, electric * * * or other line of railway."

Whether or not the street railway company is empowered as a Nebraska corporation to operate the bridge and the Iowa lines is immaterial in this case; it is, rightly or wrongly, engaged in their operation, and it is, therefore, a common carrier engaged in the interstate transportation of passengers by electric railway.

It is likewise immaterial to this inquiry that the street railway company is created under the street railway and not under the commercial railroad act of Nebraska. If, soundly interpreted, the Federal act gives the commission jurisdiction over such electric railways, State legislation is powerless to limit or to prevent such grant.

Does, then, the lack of statutory power to carry freight and to exercise the right of eminent domain so differentiate such a corporation as this street railway company from the modern interurban roads as to exempt it from the jurisdiction of the commission?

Great stress is laid upon a statement by Senator Cullom, chairman of the Senate committee, when the original act of 1887 was under consideration (Cong. Rec., vol. 17, pt. 4, p. 3472), that: "The bill is not intended to affect the stagecoach, the street railway, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects."

But whatever view may have been so expressed, it can not determine the correct interpretation of the act, particularly as it now stands, with all the changes that have been introduced since 1887.

If the language be broad enough to include such a corporation as the present street railway company, and there is no contention but that "railroad" may be and frequently is synonymous with or inclusive of "street railways," it is, moreover, immaterial that Congress may not specifically have intended to confer jurisdiction over the few comparatively insignificant interstate horse street railways of 25 years ago.

A statute of the scope of the interstate-commerce act, designed to regulate the vast interstate transportation business of the country, is not to be nar-

rowly interpreted—any more than the Constitution—in accordance with the economic or physical conditions prevailing at the time of its adoption. Then, too, the decision in *Wabash, St. Louis, etc., Railway Co.* v. *Illinois* (118 U. S., 557), definitely denying to the States the right to fix or regulate interstate rates for passengers, and thereby necessitating some congressional action, is as applicable in its reasoning to interstate street railway rates as to those of commercial railroads. Unless the commission has jurisdiction over those rates they are absolutely uncontrolled.

As noted above, while Congress has expressly excluded water carriers, except when operated in direct connection with a railroad, it has not expressly excluded street railways. Moreover, the act has been several times amended since the *Rock Creek Railway Co.* case; and not only has Congress thus by its failure to exclude street railways apparently concurred in the construction there given, but by the latest amendment it has, in fact, given its apparent sanction thereto.

In 1910 section 15 of the act was amended to read: "The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character," which is the first specific mention of street electric passenger railways. This proviso, following the grant of power to establish

through rates, etc., between railroad carriers, would have been totally unnecessary unless the commission had theretofore had jurisdiction over street electric passenger railways. Congress, therefore, must have enacted the legislation of 1910 upon the assumption that such jurisdiction had been conferred upon the commission by the original act.

The argument that many of the requirements of the act would be impossible of accomplishment by street railways does not impress us, inasmuch as this is at least equally true of sleeping-car companies, pipe lines, telegraph and telephone companies, all of which are expressly covered by the statute. As to each of them only such of its provisions as are applicable will be deemed to refer to such companies, respectively.

The frequent repetition of the phrase "passengers *or* freight" clearly indicates that a carrier of passengers only is as subject to regulation by the commission as is a carrier of both freight and passengers.

Finding substantially nothing either in the language of the statute or in the history of this legislation that indicates an intent to exclude interstate passenger street railways from its operation, and finding, on the contrary, that the words of the act are broad and comprehensive enough to include them and that some at least of the evils sought to be remedied by this legislation can be corrected only if the commission have such jurisdiction, we are compelled to differ from the views expressed by

the Circuit Court in granting the preliminary injunction, and to hold that power has been delegated to the commission to regulate rates of transportation by such companies as the complainants herein, which requires us to sustain the demurrer of the defendants and to dismiss the bill. And it is so ordered.

United States Commerce Court.

No. 31.—October Session, 1911.

The Pennsylvania Railroad Company,
petitioner,
v.
The Interstate Commerce Commission,
respondent.
The United States et al., interveners.

ON FINAL HEARING.

(For opinions of the Interstate Commerce Commission see 19 I. C. C. Rep., 356 and 392.)

Mr. F. D. McKenney, with whom *Mr. Henry Wolf Bikle, Mr. John G. Johnson,* and *Mr. Francis I. Gowen* were on the brief, for petitioner.

Mr. Blackburn Esterline, special assistant to the Attorney General, with whom *Mr. James A. Fowler,* assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for Interstate Commerce Commission.

Mr. A. M. Liveright for Hillsdale Coal & Coke Co. and Clark Brothers Coal Mining Company.

Mr. William A. Glasgow, jr., for W. F. Jacoby & Company.

Before KNAPP, presiding judge, and ARCHBALD, HUNT, CARLAND, and MACK, judges.

[December 5, 1911.]

KNAPP, *Presiding Judge:*

On January 1, 1906, the petitioner adopted and put in force the following rule or regulation for the allotment and distribution of cars to bituminous coal mines:

Commencing January 1st, 1906, assigned cars, i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars specially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading, will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all other cars will be prorated.

Some two years later, as the record indicates, certain mine operators, viz, The Hillsdale Coal & Coke Company, Clark Brothers Coal Mining Company, and W. F. Jacoby & Company, filed complaints against petitioner with the Interstate Commerce Commission, alleging that the regulation above

quoted was discriminatory, and therefore unlawful, the proceedings being known on the Commission's docket as Nos. 1063, 1111, and 1139. To these complaints answers were made in due time, and the Commission, on March 7, 1910, after full hearing, entered two orders, one entitled in No. 1063 and the other in Nos. 1111 and 1139. These orders are substantially alike, and the material parts of each read as follows:

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

The dates fixed for these orders to become effective were afterwards postponed to December 1, 1910, at which time they went into effect and have since been complied with by petitioner. In the meantime, and on October 4, 1910, the bill herein was filed against the Commission, in the Circuit Court of the United States for the Eastern District of Pennsylvania, to set aside and annul the orders in question for reasons that will be hereafter stated. Pleading to this bill, the Commission demurred to the first nine paragraphs and answered, by admissions and denials only, the allegations in the remaining paragraphs. About the same time the Hillsdale Coal & Coke Company and Clark Brothers Coal Mining Company, the complainants before the Commission in Nos. 1063 and 1111, obtained leave from the Circuit Court to intervene, and thereupon filed their joint demurrer to the bill, specifying various grounds of objection thereto.

The case was transferred to this court upon its organization, and here the United States intervened, on leave granted, and adopted as its own the demurrer and answer of the Commission. When the case came on for final hearing on the pleadings then on file, the firm of W. F. Jacoby & Company, complainants before the Commission in No. 1139, were allowed to intervene, and they also adopted as their own the pleadings of the other interveners. The sole question to be decided is the power of the Commission to make the orders which the suit seeks to set aside, and that question arises on the demurrers above mentioned.

The authority of the Commission to regulate the distribution of cars, particularly coal cars, in times of car shortage has been the subject of considerable litigation; and such authority has been so fully upheld and defined in recent decisions of the Supreme Court that any extended discussion of this case would seem to be unsuitable.

It is admitted, or at least not denied, that the Commission had jurisdiction of the parties to and the subject matter of the proceedings which resulted in the orders sought to be enjoined, and no question is made as to the regularity of those proceedings. Indeed, the precise grounds upon which these orders are claimed to be illegal are not made altogether clear, though it is less difficult to discern the purpose of petitioner in prosecuting the suit. It seems to be conceded that if the orders apply only to cars furnished for interstate shipments—as the

recital which precedes the mandatory provisions might be held to imply—they are undoubtedly valid. But the petitioner contends that they apply also, or may be construed and enforced by the Commission as applying, to cars for intrastate as well as interstate shipments, and that so construed they are in excess of the Commission's authority; and this appears to be the sole objection upon which petitioner relies.

Assuming without deciding that the orders in question should be or can be so interpreted, we are nevertheless of opinion that they are within the powers delegated to the Commission. In the course of its business as a common carrier the petitioner transports large quantities of coal to both intrastate and interstate destinations, and its cars are used indiscriminately in this service. The coal operators whose complaints were investigated by the Commission, and at whose instance the orders were made, ship their products to points within or points without the State of Pennsylvania, as market conditions or other trade interests may dictate. A large part of the business is interstate, but it is conducted in its entirety by shipper and carrier alike as a unit of operation with little or no regard to the boundaries of the State in which the traffic originates.

In view of these facts, which are wholly undisputed, we see no reason to doubt the authority of the Commission to make these orders, even though they are intended to have the application and effect which petitioner appears to apprehend. This con-

clusion necessarily follows, as we conceive, from the principles so clearly stated and so instructively discussed by Mr. Justice (now Chief Justice) White in *Interstate Com. Com'n* v. *Illinois Central R. Co.* (215 U. S., 452). Indeed, we are unable to find any substantial basis for distinguishing that case from the one at bar. The subject matter is the same in both, the facts are strikingly similar, and the orders of the Commission of nearly identical import. In that case, as in this, the Commission found as a fact, upon evidence which permitted different inferences to be drawn, that the regulations complained of operated with discriminating effect, and under such circumstances the conclusions of the Commission, as to matters within its jurisdiction, are binding upon the courts.

This conclusion is fortified by the recent decision of the Supreme Court in *Southern Railway Co.* v. *United States* (decided October 30, 1911). That case, it is true, arose under the safety-appliance laws, but the controlling principle involved applies equally, in our judgment, to the question here presented.

It may be true, as petitioner contends, that the rules condemned by the Commission are more equitable than those which conform to the orders in question, but that would in no wise justify annulling the orders, as was distictly held in the *Illinois* case, *supra.*

It may also be true that the enforcement of regulations in conformity with these orders, if applied

to cars for intrastate as well as interstate shipments, would result in some conflict with the duties of petitioner under the laws of Pennsylvania—though how this could happen is not very apparent—but if this is or proves to be the case, it furnishes no ground for our interference, since Federal authority to the full extent that it may be exerted supersedes and limits State authority.

Holding this opinion, we see no occasion for construing these orders. The sole question with us is the question of power; and if the orders here involved, upon any reasonable construction of their provisions, are within the powers conferred upon the Commission, the exercise of those powers, under the circumstances of this case, must be upheld.

The demurrers should be sustained and the petition dismissed with costs, and it will be so ordered.

CARLAND, *Judge,* concurring:

I concur in the result reached in this case for the reason that the order of the Commission when properly construed only relates to the distribution of coal cars for interstate shipment, and that the finding of the Commission upon the question of unlawful discrimination on the record presented to us is conclusive.

Upon the other matters discussed in the opinion of the court, I express no opinion.

United States Commerce Court.

No. 35.—February Session, 1912.

The Denver & Rio Grande Railroad Co., petitioner,

v.

The Interstate Commerce Commission, respondent. The United States, intervening respondent.

On final hearing.

(For opinion of the Interstate Commerce Commission, see 17 I. C. C. Rep., 225.)

Mr. Joel F. Vaile, with whom *Mr. E. N. Clark* and *Mr. A. C. Campbell* were on the brief, for petitioner.

Mr. P. J. Farrell, for the Interstate Commerce Commission.

Mr. Blackburn Esterline, special assistant to the Attorney General, with whom *Mr. Winfred T. Denison*, Assistant Attorney General, was on the brief, for the United States.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[April 9, 1912.]

KNAPP, *Presiding Judge:*

This suit was brought to set aside an order of the Interstate Commerce Commission, dated November 26, 1909, which in effect required petitioner, the Denver & Rio Grande Railroad Co., to reduce its rate on beer in carloads, from Pueblo, Colo., to Leadville, Colo., when part of a through transportation from St. Louis, Mo., to Leadville, from 45 cents to 30 cents per hundred pounds.

The principal ground upon which the order of the Commission is claimed to be invalid, and the only one that needs to be discussed, is that the order relates to the transportation of property received, handled, transported, and delivered wholly within one State, which is said to be not within the jurisdiction of the Commission because of the first proviso in section one of the act to regulate commerce. It is conceded that the transportation in question was interstate commerce, because the traffic was carried by continuous movement from a point in one State to a point in another State, and was therefore subject to the regulating power of Congress, but the contention is made that the proviso mentioned covers such transportation as is here involved, and therefore excludes it from the authority of the Commission. The facts upon which this contention is based appear to be as follows:

The Missouri Pacific Railway Co. operates a line of railway from St. Louis to Pueblo, where it connects with a line of petitioner from Pueblo to Leadville

and beyond. The rate affected by the order was applied to carload shipments of beer which originated in St. Louis during the years 1907 and 1908, and were transported therefrom by railroad through Pueblo to Leadville. The shipments in question were hauled by the Missouri Pacific to Pueblo and there delivered by that carrier without break of bulk to the Denver & Rio Grande, which completed the haul to Leadville. At the time these shipments moved, there was no joint rate of the two roads applying from St. Louis to Leadville, and the through charge was the local rate of the Missouri Pacific from St. Louis to Pueblo plus the local rate of petitioner from Pueblo to destination. In this connection it appears that petitioner had no joint rates with any of its eastern connections at Pueblo, or other Colorado common points, on traffic moving to or from points in Colorado on its lines west of Pueblo and other Colorado common points, but was a party to joint tariffs on traffic moving between eastern points and points west of Colorado—as, for example, Utah and transcontinental traffic.

The traffic in question was shipped by the William J. Lemp Brewing Co., of St. Louis, to the Baer Bros. Mercantile Co., of Leadville, the latter being the complainants at whose instance the rate in question was investigated and reduced by the Commission, and the transportation appears to have been conducted in the following manner:

Upon receiving a carload of beer at St. Louis the Missouri Pacific issued to the consignor, the William J.

Lemp Brewing Co., a receipt for the same, showing on its face that it was to be delivered to Baer Bros. Mercantile Co. at Leadville, Colo., routed via the Denver & Rio Grande. This receipt described the articles shipped, with their aggregate weight, and bore a notation to the effect that the shipment was tendered and received subject to the company's uniform bill of lading. The car in which the shipment was loaded was then moved by the Missouri Pacific on a local waybill from St. Louis to Pueblo, such waybill showing Baer Bros. Mercantile Co. as the consignee and Leadville as the destination, and containing a statement of the contents and weight of the car, with the freight charges of the Missouri Pacific computed on its local rate from St. Louis to Pueblo. Upon arrival at Pueblo the car was placed on the interchange track, where the Missouri Pacific and petitioner delivered carload traffic to each other. The agent of the Missouri Pacific at Pueblo thereupon delivered to the agent of petitioner what is known as a "transfer sheet," which showed the consignor and point of origin, the contents and weight of the car, the freight charges of the Missouri Pacific to Pueblo, and also the consignee and destination of the shipment. The car was then taken from the interchange track by petitioner and moved to Leadville on a local waybill which likewise named the consignor, and showed the consignee and destination, description of contents, the rate and charges to Pueblo, and the rate and charges of petitioner from Pueblo to Leadville. If the shipment were prepaid to destination, as gen-

erally seems to have been the case, the Missouri Pacific paid petitioner the amount of its charges from Pueblo to Leadville; if not prepaid, petitioner paid the Missouri Pacific the charges of that carrier to Pueblo and collected the entire charges from consignee at destination, such payments between the two roads being made in daily settlements. In either case the physical movement and handling of the car was precisely the same as would be the case under a joint rate and through bill of lading. The movement was continuous from origin to destination without the intervention of the consignor or consignee, and so far as they were concerned the transportation was like that over a single line. In control and management, and in fixing their respective local rates upon which these shipments moved, the Missouri Pacific and petitioner were entirely independent of each other, and there was no agreement or arrangement between them for through transportation from points on one line to points on the other, except such as is indicated by or may be implied from the manner in which such business was handled and their mutual dealings with respect thereto, as above described.

Upon these facts, as stated above, it is contended with much earnestness that petitioner was a purely local carrier within a single State of the traffic in question, and therefore as to such traffic not subject to the jurisdiction of the Commission because of the proviso in section 1, which reads as follows:

"*Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage,

or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid. * * *"

Briefly stated, the argument of petitioner's counsel is this: That section 1 of the act defines the classes of carriers subject to its provisions; that it might be plausibly contended that the proviso aimed to exclude only their strictly intrastate business; but that this construction is inadmissible because of the concluding phrase "and not shipped to or from a foreign country from or to any State or Territory as aforesaid," that is to say, because intrastate business destined to or coming from a foreign country is not excluded; and that therefore it follows that as there may be foreign business handled wholly in one State and not excluded, so there may be interstate business handled wholly in one State which is excluded.

But it would also follow that the Congress, in devising a system of railway regulation, took care to include the intrastate carriage of *foreign* commerce—comparatively small in amount—and yet purposely exempted the intrastate carriage of *interstate* commerce, which aggregates a very large volume. Only the plainest language would impute to the law-making body such an inconsistent and irrational intention. It seems clear to us that the language in question should not be so construed, and we reject the contention of petitioner because, in our judgment, it is based upon an erroneous hypothesis.

Section one not only subjects to the act, first, certain carriers, but also, second, certain trans-

portation. The proviso relates not to the carriers but to the transportation, and is therefore to be read in connection with the second clause of the section and not with the first. Summarized, the first clause relates to carriers engaged in transportation (*a*) wholly by rail, or (*b*) partly by rail and partly by water under a common arrangement, from (*c*) State to State, or (*d*) from the United States to or through an adjacent foreign country. For example, carriers transporting traffic by rail from Albany to New York for shipment to Europe would not come under this definition whether or not there were a common arrangement for rail and water transportation, but carriers engaged in moving traffic from Albany to New York by rail and thence by water to New Orleans, or from Albany to Buffalo by rail and thence by water to Toronto, would come within the definition, if there were a common arrangement. It was interstate rail transportation that was primarily sought to be regulated, not interstate water transportation, and not the rail part, within a single State, of rail and water interstate transportation unless the rail carrier and the water carrier were under a common control management or arrangement.

But as to transportation to a foreign country, unless wholly by water from point of origin to final destination, Congress had a different and definite purpose. Even though in that case there were no common arrangement between the rail and water carrier, even though no regulation of the ocean carrier or the entirely independent lake or river carrier

was intended, nevertheless Congress deemed it important to subject to the act, and therefore by the second clause did subject, that part of such transportation as was conducted within this country, although confined to a single State and conducted by a line that had no connection of any kind with an ocean carrier or with any interstate traffic. Then, out of abundant caution, as it seems, and by way of disclaimer of any authority over a carrier that confined its business to one State, and was not engaged in such interstate business as would bring it within the first clause, the proviso was added. The intended effect of this proviso was to exclude from the operation of the act such transportation, whether of persons or property, as was carried on wholly within *one* State, other than that going to or coming from a foreign country. Having given jurisdiction over certain transportation that could be conducted either in more than one or in only one State—that is, the inland transportation of commerce to or from foreign lands—it disclaimed jurisdiction over domestic traffic confined strictly and wholly to a single State. This disclaimer naturally contained the limiting clause "not shipped to or from a foreign country," to avoid any possible conflict with what immediately preceded, and to prevent an interpretation which would exclude the Albany-New York part of the Albany-New York-Europe transportation in the example above given. The proviso therefore must be regarded as a disclaimer and not as an exception. It could not, of course, be an exception to the second grant of jurisdiction over certain

transportation, and it does not in any way refer to the first grant of jurisdiction over certain carriers, either by way of disclaimer or by way of exception. It results that rail carriers engaged in such transportation of admittedly interstate commerce as is here considered were intended to be made subject to the act and are included in the classes of carriers to which the act applies.

This construction gives consistent and appropriate meaning to those provisions of the first section which define the scope and application of the entire enactment. It sustains the act as a comprehensive scheme of regulation designed to include all interstate transportation wholly by railroad, or partly by railroad and partly by water when both are used under a common arrangement, and to exempt only that intrastate transportation which is not within the power of Congress to regulate. As was said by the Supreme Court in *Texas & Pacific Railway* v. *Interstate Com. Com.* (162 U. S., 212):

"It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a State), as well that between the States and Territories as that going to or coming from foreign countries."

Moreover, it seems plain to us upon the undisputed showing in this case that these carriers, as is now their duty under the amended act, have in fact established through routes from points on one road to points on the other, or at least between St. Louis

and Leadville. Their physical connection at Pueblo by means of interchange tracks and otherwise, their constant acceptance of carload traffic from each other, their daily settlement of charges on such interchange traffic, and their habitual course of dealing with each other in the handling and transfer of through shipments, have brought about, in our opinion, those mutual relations which characterize through routes. Indeed, it is not perceived that their customary conduct of such business leaves anything to be done—and nothing was suggested in answer to inquiry on the argument of the case as to what could be done—to create the conditions which constitute through routes. Apparently they are doing for and with each other in respect of through traffic practically everything that the Commission could require under its present power to establish through routes where connecting carriers have failed or neglected to provide such facilities.

The sixth section of the act recognizes three kinds or classes of rates, namely; the rates between different points on each carrier's line; the joint rates of two or more carriers when they have established through routes and joint rates; and the "separately established rates" applied by a carrier on through traffic when there is a through route but no joint rate. This rate in question from Pueblo to Leadville seems to us clearly of the latter class. It is the rate which petitioner provided for through transportation, and it was that rate, provided and used for that purpose, of which complaint was made as re-

sulting in an excessive through charge, and which the Commission by its order reduced. The circumstance that it was the same in amount as the purely local rate of petitioner between the same points does not alter its character as a separately established rate applicable to through shipments. In our opinion both the carrier and the traffic were within the terms of the act, and the Commission had full jurisdiction to make the order in question. See *Interstate Com. Com.* v. *Chicago, R. I. & Pac. Ry.* (218 U. S., 88), where the Supreme Court sustained an order of the commission which reduced the local rates of certain carriers between the Mississippi and Missouri Rivers when applied to through traffic from eastern territory.

We do not say that a carrier located wholly within a State may not so conduct its business as to be in fact and in law a purely intrastate carrier, nor do we attempt to point out what such a carrier must do or not do to escape regulation under the act. It is sufficient to hold that the petitioner in this case, upon the undisputed and conceded facts, is subject to the provisions of the regulating statute as to the traffic and transportation here in question; and it follows, since no other ground of relief is presented by the record, that *the petition should be dismissed, and it will be so ordered.*

United States Commerce Court.

No. 40.—February Session, 1912.

Norfolk & Western Railway Company, et al., petitioners,

v.

United States of America, respondent.

Interstate Commerce Commission,

Corporation Commission of North Carolina, interveners.

On final hearing on bill, answer, and proofs.

Mr. Albert S. Brandeis, Mr. Lucian H. Cocke, and *Mr. R. Walton Moore* for petitioners.

Mr. Blackburn Esterline, with whom *Mr. Winfred T. Denison* was on the brief, for the United States.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Mr. T. W. Bickett, Attorney General of North Carolina, for the Corporation Commission of North Carolina.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[April 9, 1912.]

Hunt, *Judge:*

Some time in 1908 the Corporation Commission of North Carolina filed a complaint before the Interstate

Commerce Commission against the Norfolk and Western Railway Company, the Louisville and Nashville Railroad Company, and the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, alleging that the rates from Chicago, Cincinnati, and St. Louis and other western points in Ohio, Indiana, Kentucky, Illinois, and other States, to Winston-Salem, Durham, and other points in North Carolina, on classes, grain and grain products, and other commodities, were unjust and unreasonable in and of themselves, and unjustly discriminatory and unduly preferential and prejudicial as compared with rates on the same commodities to Roanoke, Lynchburg, Petersburg, and Norfolk, in Virginia, and that the rates to Winston-Salem, Durham, and other places in North Carolina along the lines of the Norfolk and Western should be reduced to the same basis as obtained for the said Virginia cities. The Norfolk and Western Railway Company and the Louisville and Nashville Railroad Company filed a joint and several answer, denying the material allegations of the complaint. On May 27, 1908, the Southern Railway Company and the Seaboard Air Line Railway and its receivers intervened as parties defendant, and were given the benefit of the answer of the Norfolk and Western and the Louisville and Nashville companies. On June 7, 1910, the Commission, after a hearing, filed its report and made an order to the effect that the Norfolk and Western Railway Company desist from charging local class rates on traffic from Roanoke, Virginia, to Winston-Salem, North Carolina, and from Lynchburg, Virginia,

to Durham, North Carolina, in excess of those named in the following table:

Per 100 pounds.											Per barrel.	
Class.											Class.	
1	2	3	4	5	6	A	B	C	D	E	F	H
Cts.	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*
52	42	34	25	21	17	15	18	15	13	21	30	25

Per 100 pounds.	Per ton (2,000 pounds).		Per carload.		
Class.	Class.		Class.		
K	L	M	N	O	P
Cts.					
10½	$1.60	$1.85	$31.00	$21.00	$17.00

The local class rates in effect when the order of the Commission was made were as follows:

	Class.												
	1	2	3	4	5	6	A	B	C	D	E	F	H	K
	Cts.	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts*
Durham	61	51	42	32	28	21	17	22	21	18	28	42	32	14
Winston-Salem	61	51	42	32	28	21	17	22	21	18	28	42	32	14

	Class.				
	L	M	N	O	P
Durham	$1.90	$2.20	$35.00	$26.00	$22.00
Winston-Salem	1.90	2.20	35.00	26.00	22.00

Petition for rehearing was filed by the Norfolk and Western, the Southern, and the Seaboard Air Line Railway Companies. Rehearing was denied.

Thereafter, the Norfolk and Western Railway Company, the Southern Railway Company, the Seaboard Air Line Railway, and the Louisville and Nashville Railroad Company, as petitioners, filed their joint petition in this court and prayed for the annulment of the order of June 7, 1910. After setting forth the proceedings had before the Commission, petitioners allege substantially: (1) That the reasonableness of the rates of the Norfolk and Western from Roanoke and Lynchburg to Winston-Salem and Durham was not in issue before the Commission; (2) that the order of the Commission operates to defeat the purpose of the Commission as expressed in its report, because of a mistaken view by the Commission of the effect of its order; (3) that the order should be set aside because of an inconsistency which results in arbitrarily compelling the application of lower rates on certain traffic than the Commission found were reasonable; and (4) because the Commission erred and exceeded its authority in disregarding the interests of the carriers other than the Norfolk and Western. The Corporation Commission of North Carolina has intervened. The United States and the Interstate Commerce Commission filed answers, in which they denied certain averments and set up the proceedings before the Commission. Application for a preliminary injunction was denied by this court. Thereafter, evidence was heard before one of the judges of the court, and the case is now here upon a final hearing.

The Norfolk and Western Railroad extends from Cincinnati and Columbus on the west to Norfolk,

Virginia, on the east, and to Hagerstown, Maryland, on the north. One of its divisions extends from Radford, Virginia, to Bristol, Tennessee; another south from Roanoke, Virginia, to Winston-Salem, North Carolina, a distance of 122 miles; another division extends south from Lynchburg, Virginia, to Durham, North Carolina, a distance of 117 miles. Lynchburg is 54 miles east of Roanoke on the main line. The Southern Railway runs to Durham and Winston-Salem. It has its own rails into Louisville, St. Louis, and Evansville, from which points in connection with other roads it operates in the Carolina territory and into Winston-Salem and Durham. The Seaboard Air Line reaches Durham from the north. The Louisville and Nashville Railroad runs from Cincinnati to New Orleans, with a division extending to Norton, Virginia. It also runs from Nashville to St. Louis. Traffic over its lines to the Virginia cities is handled in connection with the Norfolk and Western via the Norton gateway, and in connection with the Chesapeake and Ohio through the Louisville gateway, and in connection with the Southern through Jellico, Tennessee. The Norfolk and Western, with its connections, is the short line from Chicago to Winston-Salem and Durham. From Louisville, Cincinnati, and East St. Louis, the short line to most Carolina points is via the Louisville and Nashville, and the Southern and its connections. Rates by this route from Chicago and East St. Louis to Carolina territory are made upon combinations which do not exceed the Virginia cities combinations. From Louis-

ville and Cincinnati through rates are made by using proportional rates to Virginia cities, plus locals beyond, the proportionals equaling the differences between the Chicago rates to the Virginia cities and the locals from Chicago to Cincinnati. The Commission makes the situation clear by giving the proportional rates on the numbered classes in cents per one hundred pounds, as follows:

Class	1	2	3	4	5	6
Rate	32	28	22	15	12	10

And exemplifies by taking the Chicago-Virginia cities rate on first class, which is 72 cents per one hundred pounds, and the Chicago-Cincinnati local, which is 40 cents, finding the proportional rate to be the difference, which is 32 cents. By adding this proportional to the local from Virginia cities to Winston-Salem and Durham, the through rate from Cincinnati and Louisville, first class, was made 93 cents. The proportionals as used by the Commission applied to grain and packing-house products were respectively, 11 and 15 cents. It appears that afterwards the proportionals were taken out and thus the combination was the local rate to the Virginia cities plus the rate fixed by the Commission.

Considering the first point made by petitioners, that the reasonableness of local rates between Roanoke and Winston-Salem, and between Lynchburg and Dunham, was not in issue before the Commission, we find the allegations of paragraph 13 of the complaint before that body as follows:

"13. That the published and exacted rates between stations in Virginia and West Virginia along the line of the Norfolk and Western Railway and stations in what is known as the Durham and Winston divisions, along the lines of said railway in North Carolina, as is shown by Tariff I. C. C. No. 3156, North Carolina Interstate No. 1, are unjust and unreasonable, in and of themselves, and unduly discriminatory against the said points in North Carolina."

The third and fourth clauses of paragraph 12 of the joint and several answer of the Norfolk and Western and the Louisville and Nashville companies, filed before the Commission, read as follows:

"Respondent, the Norfolk & Western Railway Company, denies that the published and exacted rates between stations in Virginia and West Virginia along the line of respondent, and stations on what are known as the Durham and Winston divisions, along the lines of its railway in North Carolina, are unjust or unreasonable, in and of themselves, or unduly discriminatory against the said points in North Carolina.

"Respondent, the Louisville & Nashville Railroad Company, not being in position to participate in the traffic between the points referred to in Paragraph XIII of the complaint does not therefore deem it essential to either deny or affirm the allegations as contained therein."

Examination of Tariff I. C. C. No. 3156, Norfolk and Western Railway Company, effective November 15, 1907, shows on its face that it contains the

rates applicable to shipments from Roanoke and Lynchburg, Virginia, to Winston-Salem and Durham, North Carolina.

The complaint also sets forth the routes from designated western cities, Cincinnati, St. Louis, and others, to Winston-Salem, Durham, and other places in North Carolina, and to Roanoke, Lynchburg, Petersburg, and Norfolk, in Virginia, called the Virginia cities. In the exhibits made part of the complaint were the published and exacted rates from these western cities to the Virginia cities on certain numbered and lettered classes and commodities shown on the schedule attached to the complaint; and the rates from the western cities named to Winston-Salem, Durham, and other places in North Carolina on the numbered and lettered classes and on certain commodities were also made part of the complaint. It was specifically charged that merchants and shippers in the Virginia cities have a preference and advantage over merchants, manufacturers, and shippers at Winston-Salem, Durham, and other places in North Carolina in the distribution of products, commodities, and merchandise, and that under the unjust and unreasonable adjustment of rates and charges merchants and dealers and others at Winston-Salem, Durham, and other North Carolina places have been unable to compete with the Virginia cities in the reshipment of merchandise and manufactured goods in the territory contiguous to Winston-Salem, Durham, and other places in North Carolina. As part of the complaint, an

exhibit showed that the short line distances by rail from the western cities to the Virginia cities and to Winston-Salem, Durham, and other places in North Carolina were over the rails of the Norfolk and Western. It was alleged that the rates and charges of the defendants for the transportation of the various kinds and classes of property to Winston-Salem, Durham, and other places in North Carolina, from the western cities, were unreasonable and unjust in and of themselves, and relatively, as compared with the rates and charges from the same points to the said Virginia cities, and that the said rates were unjustly discriminatory and prejudicial; that the rates and charges upon shipments originating at western cities destined to Winston-Salem, Durham, and other points in North Carolina, are at a much greater rate per ton per mile than the rate per ton per mile on shipments destined to the Virginia cities; and that for the distances in North Carolina or over that portion of the distance south of the Virginia cities named, the rate per ton per mile is still greater than the rate from the point of origin to the said Virginia cities, and that the rates over that portion of the Norfolk and Western in North Carolina are higher than those over any portion of this line. The schedules of rates were referred to in support of the petition.

Taking all these averments, and considering that there is specific mention of the Durham and Winston-Salem divisions of the Norfolk and Western, and that the local rates were necessarily included in the

through rates, as the local formed a large part of every through rate to the North Carolina points, it is easily gathered that the local rates were involved in the issues. It may be that if there had been a challenge to the complaint upon the ground that it was lacking in particularity, amendment might have been ordered, but considering that liberality of statement which is allowed in pleadings before the Commission, the investigation into such local rates was authorized. *C. H. & D. R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S., 142; *Siler* v. *Louisville and Nashville R. R. Co.*, 213 U. S., 175.

The next contention is in substance that it appears from the report of the Commission that it adopted a mistaken view, and that this mistaken view was of such a character as to have vital effect upon its findings; and hence that this court has the power and should correct the error so made. This contention is based upon the report of the Commission, wherein it was assumed that "the present method of constructing through rates by the defendant carriers from Chicago, St. Louis, and Louisville, and by the Norfolk and Western Railway Company from Columbus, Ohio, to Winston-Salem and Durham, respectively, would be continued." "It is our view," the Commission observed, "that such injustice in the rates from these points of origin to the destinations involved as may result from the present excessive rates of the Norfolk and Western Railway Company from Cincinnati will be removed, and that for the present at least no order

need be made as to the traffic moving from the said points of origin other than from Cincinnati."

Petitioners urge that the Commission, in prescribing maximum through rates from Cincinnati to Winston-Salem and Durham, disregarded the "present method" alluded to, such method being the construction of a through rate on any given article of traffic from a western city to Winston-Salem or Durham by adding a fixed proportional of the rate proper between the western city and the Virginia city to the local between the Virginia city and the North Carolina destination; and, further, that by naming figures which do not represent combinations made in the way just described, the relation sought to be maintained between Louisville and western points other than Cincinnati can not be preserved. The Norfolk and Western established the rates from Cincinnati as prescribed by the order, but no reduction of rates has been made by any of the other carriers. These rates before the execution of the order were the same from Louisville to Winston-Salem and Durham as from Cincinnati to those points. Now it is argued that if the method of construction recognized by the Commission should be used in making new rates from Louisville—that is to say, adding the proportionals which are employed as a factor under the present method to the new locals from the Virginia cities to Winston-Salem and Durham—the rates from Louisville will become less than the rates fixed for the Norfolk and Western from Cincinnati, although the distance is greater. But granting that the order which

runs only against the Norfolk and Western does affect rates on other roads carrying from other points than Cincinnati, there is no sufficient reason advanced upon which this court may enjoin against the order of the Commission. Of course adjustments of rates oftentimes do have effect upon adjacent territory. These matters, however, were considered and expressly referred to by the Commission in its report, saying:

"We are not unmindful that it is our duty to consider rates applied over the entire territory likely to be affected by a change in rates to particular points. It is doubtless true that a reduction in rates to Winston-Salem and Durham to the Virginia cities basis would disarrange the whole system of rates now based thereon and made with reference thereto. We have heretofore found that conditions at Winston-Salem and Durham do not justify the extension to them of the Virginia cities rates. This is not equivalent, however, to a finding that rates to Winston-Salem and Durham are reasonable. * * *."

The conditions described would seem to be inevitable, yet it is far from being a sufficient reason for defeating the regulation of the particular rates which were under direct investigation. Ordinarily, rates not involved in the inquiry before the Commission will adjust themselves to the conditions brought about by the order, but even though the assumption that they will adjust themselves is erroneous, and the basis for the assumption involves a mistaken factor as to such other rates, still it does not necessarily

lead to the conclusion that the regulation of the rate directly involved in the order is invalid or that the order fixing such a rate should be annulled by judicial authority, provided always the rate so directly involved and fixed is reasonable and just for shippers and carriers, with relation to the particular destinations concerned.

It may be, too, that the lowering of a rate between two distant points will result in rates to intermediate points over the same line being inconsistent with the provisions of section 4 with reference to the long and short haul clause of the act to regulate commerce, but if so, there presumably is occasion for reducing such rates to intermediate points. In order to sustain reasonable rates to intermediate points, unreasonable rates between more distant points can not be sustained.

It is not for us to say whether the Commission has properly attached great or little weight to evidence adduced upon a given point, or whether the conclusion reached by the Commission upon testimony as to facts alone shows mistake as to some particular fact not essential or vital to the proceeding; or inadvertency; or is not such a conclusion as this court might have reached. If the particular matter in issue and inquired into was one of fact and a full hearing was afforded, and the conclusion reached is supported by substantial evidence, it will not be nullified by the courts. *Interstate Commerce Commission* v. *Union Pacific R. R. Co. et al.*, 222 U. S., —.

Special attention is addressed to grain rates. The Commission found no justification upon the facts appearing for condemning as unreasonable or otherwise unlawful the commodity rates on grain eastbound in carloads. Petitioners point out that the grain rate from Cincinnati to Winston-Salem and Durham as thus approved was 28½ cents per one hundred pounds; that the commodity rate on grain in carloads from Cincinnati to Roanoke and Lynchburg is 14 cents, and that the any-quantity rate prescribed from Roanoke and Lynchburg to Winston-Salem and Durham is 13 cents, making a total of 27 cents, and it is said that under the fourth section as amended, carriers being compelled to observe the combination of intermediate rates, the Norfolk and Western has found it necessary to publish a rate of 27 cents. From this it is argued that although 28½ cents was given "the stamp of reasonableness" by the Commission as the grain rate from Cincinnati to Winston-Salem and Durham, compliance with the order results in a rate of 27 cents. The testimony heard in this court upon the issues presented goes to show that the Cincinnati-Roanoke grain rate of 14 cents was compelled by competition with the Chesapeake and Ohio, and that with the 14 cent rate from Cincinnati to Roanoke and Lynchburg, the Commission having prescribed the 13 cent local rate, the Norfolk and Western had no alternative other than to make a through rate to Winston-Salem and Durham of 27 cents. About 15 per cent of the traffic hauled by the Norfolk and Western to Winston-

Salem and Durham is grain. Carrying out the argument, it is said that other carriers of grain to the North Carolina destinations must make their rates correspond to the 27 cent rate of the Norfolk and Western and suffer the reduction of revenue inevitably to follow. In this connection the evidence shows that of the Seaboard Air Line traffic from the west in 1910, 55 per cent was grain and grain products delivered at Durham, while only about 30 per cent of such products was delivered there in 1911. It would seem, however, that there is nothing to prevent the carriers interested from going before the Commission and asking that they be allowed to make a through grain rate of 28½ cents instead of 27 cents, which is the combination of the local rates. Apparently there is no restriction upon the power of the Commission to determine such a question, in view of the peculiar situation with reference to the Virginia cities rates. But without deciding whether or not the Commission, under section 4 of the Act to regulate commerce as amended in 1910, is authorized to allow a through rate which is higher than the aggregate of the intermediate rates, it can not be successfully disputed that the order of the Commission reducing the rates from Lynchburg and Roanoke to the North Carolina points involved to 13 cents for the distances—122 miles to Winston-Salem and 117 miles to Durham—was in itself the fixing of a reasonable and just rate. Assuming that the rate from Cincinnati to Roanoke and Lynchburg is forced by competition to an unreasonably low point, still the

carrier has no right to complain because it can not maintain an unreasonably high rate between Roanoke and Lynchburg and Winston-Salem and Durham.

Stress is laid upon what is called a "misconception" of the relation of other carriers to the western business, in that the Commission stated that the carriers which intervened before it did not "in any significant amount participate in traffic to Winston-Salem and Durham from the points in question." Again we encounter what was a question of fact. The report of the Commission refers to the pressure upon the attention of the Commission of the "possibility of disaster" to the interests of the intervening carriers if the prayer of the petition should be granted. Evidently there was evidence showing that besides the Norfolk and Western, the Louisville and Nashville, the Southern, and the Seaboard Air Line Railroads participated in the traffic. In the motion for a rehearing the moving parties recognized this, saying: "While there is no detailed evidence on the subject in the record, it was made to appear that the intervening carriers are very largely interested." True, in this court it was testified that in 1910, for instance, the Louisville and Nashville delivered at Norton 44.3 per cent of the total tonnage delivered at Winston-Salem by the Norfolk and Western, and in 1911, 28.8 per cent, and that in 1910 of the total tonnage delivered by the Norfolk and Western at Durham 49.2 per cent was received from the Louisville and Nashville at Norton, and in 1911, 39.1 per cent, and it was the opinion of the traffic manager

of the Norfolk and Western that this decrease in the Norton percentage was accounted for by the lowering of the rates below the Louisville and Nashville rates via Norton. The testimony also tended to show that in September, 1910, the Southern delivered at Durham 384,993 pounds of the western traffic, and in September, 1911, only 256,090 pounds, and to Winston-Salem proper from Cincinnati and passing through Cincinnati in September, 1910, via the Southern the movement was 332,413 pounds, and in September, 1911, 120,104 pounds; and that from and via Cincinnati and from and via other Ohio River crossings said to be affected by the reduced rates the movement via the Southern in September, 1910, was 2,213,711 pounds, and in September, 1911, 1,609,611 pounds. There was also evidence tending to show that certain business that formerly moved into Durham from Petersburg and Richmond over the Seaboard Air Line now moves from Lynchburg by reason of the reduction ordered by the Commission. We must remember, however, that the Commission was expressing its opinion upon the evidence which was before it when it made the order of June 7, 1910; hence so much of the evidence as shows that a volume of business which these other lines once had has been lost since the order of the Commission went into effect is not helpful in getting at the exact meaning of the term "significant amount" as used by the Commission. Some substantial participation having been proved

before the Commission, whether the extent of it was worthy of being characterized as "significant" became a matter of inference from facts, and it is beyond the power of this court to say that as a matter of law the order must fall because of such characterization.

We observe this express language of the Commission in its report: "We have considered these rates from the viewpoint of distance and transportation conditions, by the amount of revenue received, as shown by per ton-mile calculations, and drawn into consideration all matters which in any way relate to traffic between the points involved." The petition for a rehearing set forth with care the grounds upon which the petitioners conceived the Commission had erred and misapprehended facts. The rehearing was denied, and no cause is made to appear to us for believing that the conclusions of the Commission should be disturbed.

The rates ordered to be put in force by the Norfolk and Western being reasonable, we can not say that because other roads have not met the reduced rates and are losing traffic as a consequence the order of the Commission should be interfered with.

Decree for respondents.

United States Commerce Court.

No. 42—October Session, 1911.

The Arkansas Fertilizer Company, petitioner,

v.

The United States, respondent, and The Interstate Commerce Commission, intervening respondent.

ON FINAL HEARING.

Mr. E. L. McHaney for petitioner.

Mr. James A. Fowler, assistant to the Attorney General, and *Mr. Blackburn Esterline,* special assistant to the Attorney General, for the United States.

Mr. Charles W. Needham for Interstate Commerce Commission.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[Dec. 5, 1911.]

Knapp, *Presiding Judge:*

This case involves the meaning and application of a provision in the sixteenth section of the act to regulate commerce, as amended in 1906, which reads as follows: "*All complaints for the recovery of damages shall be filed with the commission within two years*

from the time the cause of action accrues." What is the "cause of action" here intended to be defined and when does it "accrue?"

The typical facts appearing in the record disclose the concrete form in which the question is now presented. In February, 1907, the petitioner shipped a carload of fertilizer from Little Rock, Arkansas, to Ravanna, Arkansas, billed to one A. S. Stuckey. The shipment was routed over the St. Louis, Iron Mountain & Southern, and the Kansas City Southern, and moved for a short distance in the State of Texas, thereby making it interstate. On February 15, 1907, the petitioner prepaid charges at the rate of 15¾ cents per 100 pounds, amounting to $85.05, and later the delivering carrier demanded the additional sum of $66.15, based on a rate of 28 cents, which was the lawful tariff rate in force at the time the shipment moved, and this sum was paid by petitioner on *March 30, 1910.*

In September, 1910, some three years and seven months after the transportation service was performed, the delivering carrier, in behalf of petitioner, applied to the Interstate Commerce Commission for authority to refund the sum of $59.40 (which would result in a charge of 17 cents on the shipment in question), making the express admission that the tariff rate of 28 cents, which petitioner had paid as above stated, was unjust and unreasonable, and agreeing to maintain for the required period a rate of 17 cents, which was established by a tariff filed with the Commission about that time. Following its

ruling in *Blinn Lumber Co.* v. *Southern Pacific Co.* (18 I. C. C. Rep., 430), the Commission denied the application on the ground that it was without jurisdiction to allow the refund, because more than two years had intervened between delivery of the shipment to the consignee and the filing of the claim for reparation. Thereafter and on June 5, 1911, the petition herein was filed to set aside and annul the order of the Commission. The United States filed an answer, and the Commission also intervened and answered. The petitioner thereupon filed motions to dismiss the answers as not stating a defense to the cause of action alleged in the petition. On this record, and the briefs of counsel, the case was submitted without oral argument.

The answer of the United States, which is in the nature of a special demurrer, alleges that the facts set forth in the petition do not constitute a cause of action, and also alleges that this court is without jurisdiction to hear and determine the case. Jurisdiction is challenged on the ground (1) that the commission has made no "order" respecting petitioner's claim, and consequently there is no basis for the suit, and (2) that the refusal of the commission to authorize the refund, if it be deemed in any sense an order, relates to the payment of money only and is therefore not within our jurisdiction. The latter objection is disposed of by the decision just rendered in *Southern Railway Co. et al.* v. *United States et al.* (No. 44), and the reasons stated for the conclusion therein reached need not here be repeated.

It is only necessary to add that if this court has jurisdiction to set aside an order of the Commission which awards reparation, it has also jurisdiction to set aside an order which denies reparation.

The form in which the Commission's refusal was expressed in this instance is not shown by the record, nor does it seem to us at all important, since the petition alleges and the answer of the Commission admits that leave to refund was denied without consideration of the merits of the claim, and solely because its allowance was prevented by the statutory provision above quoted. While the sixth paragraph of the petition, and perhaps the prayer for relief, may be open to technical criticism, it appears plain to us that the pleadings taken together sufficiently define, and therefore require us to decide, the real matter in controversy between the parties, namely, whether the Commission was correct in its construction of the law in the *Blinn* case and in applying that construction to petitioner's claim.

What, then, is the true meaning of the so-called limitation? Did it deprive the Commission of authority to permit or require these carriers to repay the amount which they had collected in excess of a reasonable charge? If so, the Commission was right and the petition herein should be dismissed; if not, the order in question—for that which has all the effect of an order may be treated as an order—should be set aside to the end that the Commission may be free to consider petitioner's claim upon its merits.

The contention of petitioner is easily comprehended and may be summarized as follows: There must be some injury for which redress is afforded by "the recovery of damages." If an excessive rate is charged the injury occurs when payment of that rate is enforced, and the measure of recoverable damage is the excess of such payment above a reasonable rate. But until the shipper is compelled to pay the excessive amount no injury has been inflicted and consequently no "complaint" can be made. Therefore, a "cause of action" does not arise, because there is no damage, until the unreasonable rate has been actually collected. In this case the balance of the tariff rate, which was a concededly excessive rate, was paid in March, 1910, a little less than six months before the delivering carrier applied for leave to refund; and we regard the application then made, since it was so regarded by the Commission, as the equivalent of filing a complaint.

We recognize the force of this contention, which is undoubtedly sustained by the common-law rule and numerous decisions in which that rule has been upheld. Indeed, it may be admitted that if this case is governed by the principle which obtains in the fields of contract litigation the ruling of the Commission involved an error of law which the courts may be invoked to correct.

But we are of opinion that the question here presented is not controlled by the general rule, and that the Commission correctly construed the limiting

provision in the *Blinn* case and therefore properly rejected petitioner's claim. This provision in the sixteenth section, inserted in 1906, is only an incidental and relatively unimportant part of a comprehensive scheme of regulation which was inaugurated by the act of 1887 and has been expanded and strengthened by successive amendments. The pervading purpose of that scheme is the prevention of unjust discriminations and the enforcement of equal treatment as between all shippers in like situation. Clearly, the provision in question should be so construed as to advance that purpose if such a construction be in any view permissible.

But if the construction contended for by petitioner is sustained it follows that judicial sanction would be given to certain preferences of obvious injustice and the aim of the law as a whole thereby measurably defeated. In other words, the limitation under review would be held to impair the beneficial purposes of the act by creating an obnoxious and indefensible exception to its requirements. This provision, moreover, in common with other amendments adopted at the same time, was designed to make the law in its entirety more efficacious, and also designed to protect from depletion, after the lapse of two years, railway earnings resulting from the application of tariff charges. To hold that the ruling of the commission was erroneous would therefore not only legalize a device for offensive favoritism, but also to an extent subvert the special purpose for which

this amendment was enacted. It is difficult to believe that such a result was ever intended.

In construing remedial statutes, especially those of a generic character, courts have not hesitated to restrict and modify the ordinary meaning of words and phrases, and even of entire paragraphs, in order to harmonize conflicting or inconsistent provisions and so enable all of them to contribute in proper degree to the object sought to be accomplished. Instances of this kind are too familiar to require citation. Indeed, the Supreme Court in the *Abilene* case (204 U. S., 426) declared that a right of action as old as the common law had been taken away by the act to regulate commerce, since otherwise full effect could not be given to the purpose of that statute to prevent discriminations. Bearing in mind how rarely suits were brought to recover damages for excessive railroad charges, and how easily collusive delay in the payment of freight bills could be utilized, as the Commission points out, to give preferences which are actual rebates, it seems well within precedent to reject petitioner's contention and to uphold a construction under which, as Commissioner Lane observes, "the act becomes workable and enforceable from the standpoint of shipper, carrier, and the Commission itself."

Any serious doubt in this case should disappear, as we think, when once it is clearly perceived that the relations between shipper and carrier are no longer contract relations; that the rights and obligations of both are fixed not by mutual agreement

but by the mandate of the statute; that the duty of the shipper to pay and of the carrier to collect the tariff rate in force when the transportation takes place, even though that rate be grossly excessive, is a duty imposed by legislative enactment; and that it is beyond the power of the parties to evade or modify this duty by any consent or understanding. In other words, since the obligation to pay the tariff charge springs from a positive law, the extension of credit because such charge is claimed or admitted to be unreasonable can not be granted by the carrier or accepted by the shipper. It follows that the reasons for the general rule above adverted to are altogether wanti g in the case here presented, and therefore the rule itself should be denied application.

Moreover, when all the provisions of the act and supporting laws are taken together, and the doctrine of the *Abilene* case kept in mind, it becomes evident that the basis of a claim for reparation, which is the kind of "action" referred to in the limitation clause, is the existence at the time the claimant's shipments moved of an unreasonable rate established by the carrier's tariff and imposed upon all shippers alike; and that there can be no "recovery of damages" except as incident to a determination by the Commission that such rate was unreasonable, including the extent to which it was unreasonable, and the fixing of a lawful rate for the future, unless the carrier has in the meantime voluntarily made the proper reduction. The real cause of action is the publication of a rate that is unlawful because excessive, and it "accrues"

as to a particular shipper when his property is transported under that rate. As Commissioner Harlan says in his concurring report in the *Blinn* case:

"The unlawfulness of the rate is the shipper's cause of action, and the amount actually paid by him in excess of a lawful rate is but the measure of his damages. The wrong done to the shipper, with respect to shipments already made, arises out of the publication by the carrier of an unlawful rate and the obligation imposed upon the shipper by the publication to pay that rate. The bar of the statute therefore commences to run when the obligation of the shipper to pay the unlawful rate has become a completed obligation, namely, upon the delivery of the shipment to him at destination, and manifestly can not be postponed by the failure of the shipper to fulfill his obligation. It is true that there can be no recovery of damages unless the unlawful rate has been paid; nevertheless, the inquiry in any such proceeding is whether the published rate was excessive, and, if so, to what extent. That is the issue, the cause of action, as well as the subject matter of the controversy between the shipper and the carrier; and when resolved in favor of the shipper the extent of his damages on a particular shipment is a mere matter of calculation, wholly incidental to the controversy."

At common law one who had paid an excessive rate could ordinarily maintain a suit to recover the excess. His cause of action obviously arose when the damages were incurred; that is, when he was compelled to pay

that rate. Prior to such payment he had no common-law remedy because he had suffered no injury. The contract obligation to pay the excessive charge did not damage him, because that obligation was unenforceable as to the excess above a reasonable charge.

But such an action can no longer be maintained, as the Supreme Court decided in the *Abilene* case, *supra*. The present obligation is statutory and not contractual. The shipper is now bound to pay the full tariff rate, even though it be unreasonable, and is therefore deprived of his former defense, if suit be brought to enforce payment of the tariff rate, unless the statute makes provision for his relief. It follows from this change in the law that, whether he actually pays the tariff rate or only incurs the obligation to do so, he can neither sue for damages in the one case nor on the other defend a suit for the tariff charge, unless the Commission shall have found that such tariff rate was unreasonable, and the extent to which it was unreasonable, when his property was transported.

The regulating statute gives the shipper a right to reparation, that is, a right to complain to the Commission and, if the facts justify, obtain its findings and order accordingly. The order in such case is not the real basis of his suit or defense at law, but rather a condition precedent thereto. In other words, the shipper may complain of a tariff rate not only to secure its reduction for the future, but also, if his traffic has moved under that rate, to have the Commission determine what would have been a reasonable rate thereon; and, as respects the authority of the

Commission, it would not matter whether the rate had been paid or partly paid or remained wholly unpaid. If paid, the report and findings of the Commission would fix the portion he was entitled to have refunded; if not paid, his statutory obligation would be ascertained.

The nature of the order awarding damages in connection with the reduction of the rate might therefore vary according to the situation at the time the Commission made its report. If payment had been made the order would require the carrier to refund the excessive amount, and the shipper could then sue at law for his damages, offering the order as *prima facie* proof of his case. If payment had not been made the only reparation that the shipper could secure would be the finding of the Commission that the tariff rate was unreasonable, to such a degree as might be determined; and, for aught we can see, the Commission in such case could make an order which would be available to the shipper as *prima facie* proof of his defense to the carrier's suit.

The cause of action before the Commission, however, is the same in either case, viz, to secure a reduction of the tariff rate and a finding as to the damages resulting from its exaction, whether in cash or in the obligation, otherwise binding, to pay the unreasonable tariff rate; and this cause of action accrues, in our judgment, not when the exaction is enforced, but when the obligation is incurred—that is, when the service is performed. Its nature remains unchanged by reason of subsequent payment, if payment was not

made at the time, since such postponed payment affects only the form and not the substance of the Commission's order.

To interpret the statute as denying relief to a shipper who has not yet paid an unreasonable charge, although the carrier admits his complaint of unreasonableness and offers to remit the excess if the Commission will give its permission, would require him to go through the meaningless form of paying a sum of money to which the carrier is not entitled and which the Commission would immediately require the carrier to refund. Nevertheless, such permission must be obtained, because otherwise the refund would be unlawful on the part of both shipper and carrier. While the statute in terms provides that the Commission may order the carrier to pay damages, we do not feel required to interpret the word "pay" in the narrow sense of a money transaction. It is equally a payment, within the contemplation of this provision, to be relieved from an obligation which the law imposes; and an order to remit the excess above a reasonable charge, which the Commission has fixed, is in substance and effect an order for the "recovery of damages" within the meaning of the clause in question.

The purposes of the act as a scheme of regulation and the language of the provision in question indicate clearly that this is a limitation which operates without the aid of pleading. So far from being a defense which the carrier may or may not interpose, it is in effect a restriction upon the authority of the Commis-

sion itself, since its plain intent is to deprive that body of jurisdiction to allow reparation after the lapse of two years. A similar provision relating to claims against the United States reads as follows:

"That every claim against the United States, cognizable by the Court of Claims, shall be forever barred, unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues."

Construing this provision the Supreme Court held that it could not be waived and need not be pleaded. (*Finn* v. *United States*, 123 U. S., 232, 233.)

The conclusion we have reached in this case is supported, in some measure at least, by a further consideration. The ruling of the Commission in the *Blinn* case is more than the decision of a particular controversy; it is also the administrative construction of the law by the tribunal charged with its enforcement. It is now nearly two and a half years since this ruling was promulgated. During that time it has been applied in numerous instances and come to be widely known and generally accepted. Under such circumstances the ruling should not be set aside, except for the most convincing reasons, and such reasons have not, in our judgment, been made to appear in this case. (*New Haven R. R.* v. *Interstate Com. Com'n*, 200 U. S., 401.)

Believing that the Commission was right in rejecting petitioner's claim, and agreeing substantially with

the views expressed by Commissioners Lane and Harlan in the *Blinn* case, we see no occasion for more extended discussion. It follows that *the petition herein should be dismissed with costs, and it will be so ordered.*

ARCHBALD, *Judge,* concurring:

I agree that the petition should be dismissed, but not on the ground that the proceedings before the Commission were not in time, on which I do not undertake to pass. The Government has moved to dismiss for the reason that as the case stands there is no order of the Commission to be reached; and that all, in effect, that we are asked to do is to give a construction to the statute different from that expressed by the Commission, which, aside from an actual adjudication, it is not our province to do. This motion, if well taken, can not be disregarded, and in my judgment it clearly is.

The petitioner was not a complainant before the Commission. The proceedings there were instituted by the carrier and consisted of a petition asking leave to make reparation for an excessive freight charge which had been admittedly exacted on a single shipment some time before. The Commission refused to entertain the petition on the ground that according to its previous ruling in *Blinn Lumber Co.* v. *Southern Pacific R. R.* (18 Inter. Com. Rep., 434) it was too late, more than two years having elapsed since the goods were shipped and the excessive charge made, although it was within two years of

the time when the rate was paid. The present petition is by the shipper, and, after setting forth the facts, complains that the construction so placed by the Commission on section 16 of the interstate commerce act, that a cause of action on a claim for reparation accrues within the meaning of the law on the date when the freight is shipped, and is barred unless complaint is made to the Commission within two years from that time, is erroneous, and should be set aside and held for naught by this court. The prayer is that "the petition be heard and granted," and that the petitioner "be permitted to file its claim for reparation with the Commission and have all other and proper relief."

The case has been submitted on briefs, counsel for the petitioner not being able to be present. The question involved is an important and difficult one, and, for a correct solution, needs all the light possible by way of oral argument, and we lack that valuable aid. No merely advisory opinion is to be indulged in, and that, having regard to the record, is all, as it seems to me, that would result here. As already stated, the shipper made no complaint to the Commission. The carrier simply asked leave to redress what it had done, by repaying the excess charge. It may be that this practice is sanctioned by the statute, but it can not be made to take the place of that which is required of the shipper before he has ground for coming here. Where the shipper has a grievance he is to apply to the Commission (sec. 13), setting forth his cause of complaint, the carrier being

called on to satisfy it or show cause why it should not. And if the Commission, after a hearing (sec. 16), decides that the shipper is entitled to damages, an order is to be made on the carrier to pay by a day certain, which the shipper, on failure of the carrier to comply, may enforce by proceedings against it in court. It is with regard to complaints of this character that it is provided that they shall be filed with the Commission "within two years from the time the cause of action accrues and not after"; the meaning of which is the subject of controversy here.

The essence of the proceedings which are thus provided for by the statute is to be maintained, and this calls for a complaint by the shipper as the fundamental thing. A petition by the carrier for leave to make good to the shipper that which is the subject of complaint is not a substitute therefor. The closer the statute is adhered to the less chance is there to go astray. The difficulty is that neither the issue nor the outcome in the two proceedings is the same. The one is adversary, however the carrier may come in and admit it, and looks to an order which the carrier is required and may be compelled to obey; the other merely seeks permission to make redress, which, being sanctioned, if at all, by reason of the general supervision of the Commission over the affairs of interstate carriers, is more or less a matter of discretion, and upon being refused leaves the parties practically as they were before. Where the shipper complains and an order in his favor is made he has something on which he can proceed. Or, if

it is refused, under our ruling in the *Proctor & Gamble* case (188 Fed., 221), upon a proper showing he would have ground for relief here. But where on application of the carrier the right to make reparation is denied, there is no order adverse to the shipper, in contemplation of law, however much it may stand in the way of his getting his money in practical effect, the carrier without the approval of the Commission not caring to take the risk.

It can not be said, in other words, that, by the refusal of the petition of the carrier, the shipper is denied a right which he is entitled to maintain. It is still open to him to make his complaint to the Commission and get a ruling thereon. And it is only the attitude already taken by that body, or, as it is charged in the petition, the construction put by it on the statute, which stands in the way. But complaint might just as well be made of the ruling in the *Blinn* lumber case, on which the Commission relies, that being where the trouble begins. The right to file a claim for reparation with the Commission, which is prayed for, is thus, in fact, in the petitioner's own hands. There are other considerations which are opposed to a petition by the carrier being taken as the equivalent of a complaint by the shipper, as for instance, if the shipper is not content with the reparation proposed, a situation with which on any such basis it would be awkward to deal. It is difficult to see also, how, if the carrier is willing to make reparation and the Commission is satisfied that there is no collusion, the matter of time should stand in the way.

But without enlarging further, it seems to me, that only by the most extreme construction can the rejection of the carrier's petition be regarded as an order of the Commission, over which we have jurisdiction, and with respect to which at the instance of the shipper we can grant relief and particularly the relief here asked; and that the motion to dismiss should be granted for this reason, but not for the reason that the petition presented by the carrier to the Commission was not in time.

CARLAND, *Judge*, dissenting:

I am unable to concur in the result reached by the majority. Section 16 of the act to regulate commerce provides:

"That if, after hearing on a complaint made as provided in section thirteen of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. * * * All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues. * * *"

By the very language of the statute itself, the two-year limitation only applies to complaints for the recovery of damages; therefore, it can not be claimed that Congress intended to fix any limitation as to complaints where no damages were claimed. It is

true that section 13 of the act provides that no complaint shall be dismissed because of the absence of direct damage to the complainant, but this last provision has no application to complaints which have for their only object the recovery of damages; otherwise, such a complaint could not be dismissed even if no damage was shown to the complainant. There are other complaints provided for in section 13 to which this provision would be applicable. The limitation of two years being restricted to complaints for the recovery of damages, it necessarily results that a complaint which does not claim damages is not within the limitation.

The words "cause of action," mentioned in the statute, must not be confounded with the proceeding to establish such cause of action before the Interstate Commerce Commission. The cause of action must exist before the proceeding can be had. In other words, the cause of action must not be confounded with the remedy. The cause of action which exists in favor of a shipper for an unreasonable and unjust charge for the transportation of freight is the cause of action which the shipper has against the carrier; and if he has paid no unjust charge he has no cause of action against the carrier, and therefore he has no right to file a complaint before the Commission for the recovery of damages, as he has suffered no damage. The shipper's right of action in the case at bar accrued whenever the event happened which enabled it to file a complaint with the Commission showing on its face that it had suffered damage, and the shipper

could not, until it had been injured by the payment of the excessive charge, claim damages.

The attempt to sustain the result reached in this case by claiming that the obligation of the shipper to pay reasonable and just rates is now statutory and not contractual is not convincing, first, because the obligation to pay reasonable and just rates is no less contractual now than it was before the act to regulate commerce. The statute provides that all charges made for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith shall be just and reasonable. So did the common law. The implied obligation to pay such charges arises from the delivery of the property of the shipper to the carrier to be transported and is as much a matter of contract now as ever; and, second, conceding for the sake of argument that the obligation to pay is statutory, this fact is in no way determinative as to when a shipper is damaged.

In the absence of a declared intention to the contrary, we must presume that Congress used the words "cause of action accrues" in the sense that, it is admitted, they are understood by the legal profession in similar cases. If Congress desires that the period of two years' limitation shall commence to run from the time the freight moves, it can easily amend the law. It is our duty to declare the law, not to make it.

The fundamental error, it seems to me, in the ruling of the Commission, arises, first, by confounding the remedy or proceeding of the shipper before the Commission with the cause of action which the ship-

per has against the carrier; and, second, by attempting to put a construction upon the statute of limitations that will carry out the desire and purpose of the Commission in the performance of its administrative duties. It is urged that to leave it to the carrier and shipper to determine when the payment of the excessive freight rate shall be made permits the carrier and shipper to wait until all other shippers have paid their charges and then take up the matter of reparation with the particular shipper who has been given a long credit, and thus to bring about a preference or discrimination, and perhaps a form of rebate. But even if this is so, a fear on the part of the Commission that discriminations and rebates may result from a construction of the statute different from the one established in the *Blinn* case is no reason for giving a meaning to the statute at variance with all precedent. The Commission at one time decided, contrary to its former rulings, that it was illegal for a carrier to pay the actual cost of elevating grain at a transfer point, and one of the grounds of this decision was the fear on the part of the Commission that this payment would open the door for the payment of rebates and undue discriminations; but the courts seem to have held that the fear that some illegal practice might result was no reason for condemning a practice otherwise honest and lawful. (*Interstate Commerce Commission, appellant,* v. *F. H. Peavey & Co., et al.,* decided by the Supreme Court Nov. 13, 1911.)

I am of the opinion that the attempt to apply the law as stated in *T. & P. Ry. Co.* v. *Abeline Cotton Oil Co.* (204 U. S., 426) is beside the question, as in the case at bar it is simply a question of the proper construction of an ordinary statute of limitations in which the construction of no other portion of the law seems to be involved. Nor am I persuaded that the doctrine of the *Blinn* case, enunciated by the Commission in May, 1910, contrary to all their previous rulings and subject to a dissent of two of the members of the Commission, establishes any construction of the statute so long continued as to be of any weight in deciding the present case. I am of the opinion that the Commission could raise the question of the statute of limitations itself, and also that under the pleadings as they stand in this case the question whether there was a formal order is foreclosed. I am further of the opinion that the fertilizer company, being the real party in interest, may, under well-recognized principles of equity jurisdiction, maintain the petition in this case, although it filed no complaint with the Commission. (*Interstate Commerce Commission* v. *Diffenbaugh*, United States Supreme Court, Nov. 13, 1911; 176 Fed., 409.)

The order of the Commission should be vacated and the case heard by it on its merits.

I am authorized to say that Judge HUNT concurs in this dissent.

United States Commerce Court.

No. 44.—October Session, 1911.

Southern Railway Company, et al., petitioners,

v.

United States of America, respondent.

Interstate Commerce Commission, intervening respondent.

ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

Mr. R. Walton Moore, Mr. Merrel P. Callaway, Mr. Charles J. Rixey, jr., Mr. Alfred P. Thom, Mr. Henry T. Wickham, and *Mr. W. S. Bronson* for the petitioners.

Mr. Blackburn Esterline, special assistant to the Attorney General, with whom *Mr. James A. Fowler,* Assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell, for the Interstate Commerce Commisson.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[Dec. 5, 1911.]

Hunt, *Judge:*

The only question now before us pertains to the jurisdiction of the Commerce Court.

The petition was filed by the Southern Railway Company and the Chesapeake and Ohio Railway

Company, asking in effect that two certain orders of reparation in favor of the St. Louis Blast Furnace Company made by the Interstate Commerce Commission be annulled and that pending suit the enforcement of each of said orders be enjoined.

The Commission intervened in this court and joins with the United States in a motion to dismiss the petition because each of the orders made by the Commission and referred to in the petition is an order for the payment of money only, and the Commerce Court has no jurisdiction over the subject matter.

By the terms of the act to create a Commerce Court (approved June 18, 1910) exclusive jurisdiction of these several kinds of cases, among others, was conferred upon it:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

There was express denial of enlargement of the jurisdiction of the circuit courts as such jurisdiction was vested when the act to create the Commerce Court was passed. The act merely though precisely transferred to and vested in the Commerce Court exclusively whatsoever power the circuit courts had theretofore possessed to hear and

determine the kinds of cases or proceedings enumerated. We have so held in *The Procter and Gamble Company* v. *United States* (188 Fed., 221).

In the grant of jurisdiction to the Commerce Court, exclusive yet full though it is in the classes of cases discussed, there is an express provision that nothing in the act shall affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the classes enumerated in the paragraphs of section 1 heretofore referred to. Bearing in mind the language of the exception of all cases for the enforcement of orders for the payment of money, it at once becomes apparent that actions at law where right of jury trial is preserved can not be tried in this court. However, as to such actions, the statute is not silent, for the language of that clause of section 1 of the act creating this court, whereby it is affirmatively provided that the act shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the classes enumerated in the act establishing the Commerce Court, clearly comprehends them and preserves the rights of parties as they existed before June 18, 1910. Such a construction of the act makes each part effective by cutting out from the jurisdiction of the circuit courts and transferring to this court exclusive jurisdiction over various kinds of cases, yet reserving the jurisdiction in those courts as it was possessed over

cases which but for the exception would have been included in the general clause.

The language which defines an order which may be affected by decree of this court is unrestricted; "any order" which is involved in a direct suit to enjoin, set aside, annul, or suspend, provided always it is a case where a circuit court formerly possessed jurisdiction to annul, set aside, or suspend. And that prior to June 18, 1910, the circuit courts had jurisdiction is evident, for the language of section 16 of the Hepburn Act of June 29, 1906, expressly vested in such courts power to hear and determine suits to enjoin, set aside, annul, or suspend any order of the Commission. We can not read into the clause which confers jurisdiction upon this court words of limitation other than those which formerly circumscribed the powers of the circuit courts, nor can we except from the described kinds of cases where injunction, annulment, or suspension may be had orders for the payment of money. The fundamental principle that Congress is presumed to have expressed its meaning with due deliberation, and that it is not within the power of the court to go beyond the plain expressions of the legislature, prevents the court from holding otherwise.

We need go no further now than to hold that since the approval of the act creating this court, a carrier which is ordered to pay damages, and which could have gone to the circuit court in equity to have such an order annulled or enjoined, has now the right to ask this court to enjoin or annul

or suspend such an order, provided always it can show grounds for equitable relief. And as the jurisdiction of this court over such a case is exclusive, it follows that no other court can entertain a bill in equity for the direct purposes of annulment or suspension as aforesaid.

We are urged to adopt the view that when Congress excepted from the kinds of cases over which the Commerce Court may exercise jurisdiction the enforcement of an order for the payment of money, it could not have intended to authorize us to annul such an order, it being said that when the circuit court tries an action at law to enforce such an order, that court necessarily has power to deny relief, on the ground that the order is illegal and void, and that therefore there is a destruction of that clause of the act which makes the jurisdiction of this court exclusive over cases to annul any order of the Commission. The difficulty with this reasoning lies in confounding these two propositions: On the one hand, an express affirmative denial of power to this court to try an action sounding in tort as does one to recover damage for excesses of rates collected as ordered by the Commission, wherein right of trial by jury must be preserved; and on the other hand, an express grant to this court of exclusive authority to hear and decide a petition brought to annul or enjoin an order of the Commission. No suit having for its purpose the annulling of an order for the payment of money is brought in the circuit court, and none

can be, the jurisdiction of this court being exclusive in actions of that kind. The case in the circuit court is one to recover damages upon an order duly made by the Commission. True, a defense, among others available, may involve the validity of the order upon which plaintiff bases his action, but we need not dwell upon what questions may be presented in the circuit court, for we have no jurisdiction over them. It is plain, however, that if such a defense is sustained in the circuit court, the ruling does not thereby affirmatively annul and set aside the order of the Commission; it merely determines that as between the parties before it the order is not a valid legal basis for the particular claim sought to be enforced. In actual practice, where law and equity courts are invoked, there may arise some opportunity for varying views upon the validity of an order of the Commission. Surely, though, instances of divergent views will not happen more often than they do under any system where separation of law and equity obtains, and in any event are not of such serious apprehension as to justify a construction of the statute which would subtract from the lawful authority deliberately conferred by Congress upon this court exclusively to enjoin, set aside, annul, or suspend, in whole or in part, " any order " of the Commission.

As what we have said is controlling upon jurisdiction, the only question now presented, *the motion to dismiss, must be denied.*

So ordered.

United States Commerce Court.

OCTOBER SESSION, 1911.

THE NASHVILLE GRAIN EXCHANGE AND The Nashville Board of Trade, petitioners, v. UNITED STATES OF AMERICA, RESPONDENT, and Interstate Commerce Commission, intervener.	No. 46.
LOUISVILLE & NASHVILLE RAILROAD COMpany and Nashville, Chattanooga and St. Louis Railway, petitioners, v. UNITED STATES OF AMERICA, RESPONDENT, and Interstate Commerce Commission and W. S. Duncan & Company et al., interveners.	No. 47.

ON MOTION FOR TEMPORARY INJUNCTION ON THE PART OF PETITIONERS, AND ON MOTIONS TO DISMISS BY RESPONDENT AND INTERVENERS.

Mr. K. T. McConnico, with whom *Mr. Lee Douglas* was on the brief, *Mr. R. Walton Moore,* and *Mr. Albert S. Brandeis,* for the petitioners.

Mr. Blackburn Esterline, special assistant to the Attorney General, with whom *Mr. James A. Fowler,* assistant to the Attorney General, was on the brief, for the United States.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Mr. William A. Wimbish for the intervening shippers.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[October 24, 1911.]

CARLAND, *Judge:*

The above cases are before the court on motion of the petitioners in each case for a temporary injunction, and on the joint motion of the United States and the Interstate Commerce Commission to dismiss the petition in case No. 46, and on motion of W. S. Duncan and Company et al. to dismiss the petition in case No. 47.

The joint motion of the United States and the Interstate Commerce Commission to dismiss the petition in case No. 46 is based upon the alleged want of capacity in the petitioners therein to maintain an original petition in this court for the purpose of setting aside the order of the Interstate Commerce Commission of which complaint is made. As counsel for petitioners in case No. 46 have requested that if in the opinion of the court there should be doubt as to the right of said petitioners to maintain said petition, then that said

petitioners be granted leave to have said petition treated as a petition in intervention in support of the petition filed in case No. 47, we do not deem it necessary to pass upon the motion to dismiss, but under and by virtue of the power conferred upon courts of the United States by section 921, R. S. U. S., will consolidate said cases Nos. 46 and 47 and order that the petition in case No. 46 stand as a complaint in intervention in support of the petition filed in case No. 47.

It is insisted, however, by counsel for the United States and the Interstate Commerce Commission that the petitioners in case No. 46 have no such interest in the controversy as entitles them to intervene in case No. 47. We think this contention can not be sustained. The last proviso of section 5 of the act creating this court provides as follows:

"*Provided further,* That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the terms of this act or the acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof."

The Nashville Grain Exchange is a corporation organized under the laws of Tennessee, and is an association of the grain dealers of the city of Nash-

ville in said State, including in its membership practically all of the dealers in grain, grain products, and hay in said city. The Nashville Board of Trade is a corporation organized under the laws of Tennessee, and is the leading commercial organization of the city of Nashville, representing in an organized way the bulk of the substantial business interests of said city.

Language could not very well be made broader than the terms of the statute. It not only permits communities, associations, corporations, firms, and individuals who are interested in the controversy to intervene, but such communities, associations, corporations, firms, and individuals, if interested in the question before the commission or in any suit which may be brought by anyone under the provisions of the act creating this court, may intervene in any suit or proceeding at any time after the institution thereof. While there may be room for argument as to the character of the interest which such communities, associations, corporations, firms, and individuals should have in the controversy in any suit in this court, there certainly can be no question but that the petitioners in case No. 46 are interested in the question to be decided in case No. 47. It has sometimes been held that parties who were merely interested in the question to be decided in a lawsuit were not interested within the terms of a statute which provided that parties in interest might intervene, but Congress in the lan-

guage of the law above quoted was careful to make the law broad enough to include not only those who might be directly interested in the controversy, but those who were interested in the question to be decided.

The mandatory part of the order of the Interstate Commerce Commission sought to be annulled in these proceedings is as follows:

"*It is ordered*, That the above-named defendants be, and they severally are hereby, notified and required to cease and desist, on or before the 1st day of August, 1911 (postponed by the commission to November 1st, 1911), and for a period of at least two years thereafter abstain from granting to Nashville and to the dealers in grain, grain products, and hay located at Nashville, the privilege of so rebilling or reshipping said products from Nashville so long as said defendants refuse and refrain from granting the said privilege of rebilling or reshipping grain, grain products, and hay to Atlanta, Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, and Athens, or either of them, and to the dealers in said commodities located at said cities."

It is shown by the petitions and affidavits in these cases that the enforcement of this order will result in the destruction of the existing business of grain dealers at Nashville, and said grain dealers are members of the Nashville Grain Exchange and the Nashville Board of Trade.

So far as the motion for the temporary injunction is concerned, we are of opinion that the same should be granted in case No. 47. Section 3 of the act creating this court provides as follows:

"That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order, pending the final hearing and determination of the suit."

The word "discretion" used in the law of course means a legal discretion, a discretion controlled and limited by sound principles of law applied to the facts in each particular case. The principles which govern courts of equity in granting temporary injunctions are well known to the profession and need not be stated here. One of those principles, however, may be stated as follows: Where the case in which the temporary writ of injunction is asked presents questions of grave importance and difficulty, and it appears from the pleadings and affidavits presented upon the hearing for the temporary writ that great damage will result to the complainant if the writ is not granted and he shall finally be successful in the litigation,

and on the other hand that the granting of the writ will not cause serious damage to the defendant as compared with the damage which would result to the complainant if the same were not granted, a court of equity will unhesitatingly, in order to maintain the present status, issue a temporary writ of injunction.

In this case the pleadings and affidavits satisfy the court that the petitioners will be greatly damaged if the temporary writ is not granted and they shall finally be successful in the litigation. On the other hand, we are satisfied that, in comparison with the damage which would thus be suffered by the petitioners, the damage which will result to the respondent and interveners if the temporary writ is granted and they shall be successful in the litigation will be small. We fully appreciate the grave and responsible duty imposed upon this court by law in reference to the granting of injunctions restraining or suspending the orders of the Interstate Commerce Commission, and such cases will always be approached and considered with the care and consideration which such duty imposes. In view of the principles which should guide all courts of equity in granting temporary writs of injunction, and in view of the great responsibility above mentioned, we think the pleadings and affidavits presented to us on this hearing present a clear case for the granting of an order suspending

the enforcement of the order complained of until the further order of the court.

In regard to the motion to dismiss made by W. S. Duncan and Company et al., in case No. 47, it appears that the motion strikes at the foundation of the case. A consideration thereof will be deferred, therefore, until the case is heard upon the merits.

United States Commerce Court.

No. 47.—April Session, 1912.

Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, petitioners; Nashville Grain Exchange, Nashville Board of Trade, intervening petitioners;

v.

United States of America, Respondent; Interstate Commerce Commission, W. S. Duncan & Company, et al., intervening respondents.

For opinion of the Interstate Commerce Commission, see 21 I. C. C. Rep., 186. See also 16 I. C. C. Rep., 590, 18th I. C. C. Rep., 280.

Mr. R. Walton Moore, with whom *Mr. M. P. Calloway* and *Mr. C. J. Rixey, jr.*, were on the brief, for the Nashville, Chattanooga & St. Louis Railway, and *Mr. Albert S. Brandeis*, with whom *Mr. William G. Dearing* was on the brief, for the Louisville & Nashville Railroad Company, petitioner.

Mr. K. T. McConnico, with whom *Mr. Lee Douglas* and *Mr. John A. Pitts* were on the brief, for the intervening petitioners.

Mr. Blackburn Esterline, special assistant to the Attorney General, with whom *Mr. Winfred T. Deni-*

son, Assistant Attorney General, was on the brief, for the United States.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Mr. William A. Wimbish for the other intervening respondents.

ON FINAL HEARING.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[June 7, 1912.]

CARLAND, *Judge:*

This proceeding was instituted for the purpose of obtaining a judgment annulling an order of the Interstate Commerce Commission made on June 9, 1911, requiring the Louisville & Nashville Railroad Company, hereafter called the L. & N., and the Nashville, Chattanooga & St. Louis Railway Company, hereafter called the N. C. & St. L., to cease and desist for a period of two years from and after August 1, 1911, from granting to Nashville, Tenn., and to dealers in grain, grain products, and hay located at Nashville, the privilege of rebilling or reshipping grain, grain products, and hay from Nashville, so long as said railroads should refuse and refrain from granting said privilege of rebilling or reshipping grain, grain products, and hay to Atlanta, Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, and Athens, Ga., or either of them, and to the dealers in said commodities located in said cities.

The L. & N. owns and operates a line of railroad from Louisville, on the Ohio River, in Kentucky, to

Nashville, Tenn., on the Cumberland River, and from Nashville to Birmingham and Montgomery. Its rails do not reach Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, and Athens, Ga. It has a line of railroad running from Louisville and Cincinnati to Atlanta, but does not reach Atlanta via Nashville.

The N. C. & St. L. owns and operates a line of railroad from Hickman, Ky., on the Mississippi River, to Nashville, crossing the Tennessee River at Johnsonville, and from Nashville to Atlanta via Chattanooga. Its rails do not reach Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, and Athens, Ga. The rebilling or reshipping privilege condemned by the order of the Commission is as follows:

On grain, grain products, and hay shipped to Nashville by rail from or through Ohio or Mississippi River crossing points such as Louisville, Evansville, Hickman, Paducah, Cairo, etc., the L. & N. and N. C. & St. L. charge the full local freight rate from said crossing points to Nashville. These shipments may then be stopped at Nashville for a period not exceeding six months, during which time they may be rebilled or reshipped to destinations in Southeastern and Carolina territory; and on such reshipments so rebilled the freight charges into and out of Nashville are readjusted so that the total transportation charge on any one shipment from any given Ohio or Mississippi River crossing, via Nashville, to any given destination in said territory, shall exactly correspond

with the transportation charge legally assessable on that shipment had it been billed and moved through from its point of origin at the said Ohio or Mississippi River crossing points to its final destination without having been stopped in transit at Nashville.

In the case of *W. S. Duncan & Co. et al.* v. *N. C. & St. L. Ry.* (16 I. C. C. Rep., 590) the Commission held this reshipment privilege above described to be an illegal device by which grain, grain products, and hay might be transported at less than the tariff rate applicable thereto, and also that it gave to Nashville an undue and illegal preference and advantage, and subjected other points in the Southeast to unjust and unreasonable prejudice and disadvantage. The order of the Commission, however, in the case cited, was held in abeyance until further consideration could be given to the general question of the validity of transit privileges. The matter was further considered by the Commission, and in the case entitled "In the Matter of the Substitution of Tonnage at Transit Points" (18 I. C. C. Rep., 280) the Commission refused to condemn transit privileges as such, but notified the carriers that such privileges must be carefully policed so that their use should not violate the law.

In view of the conclusion reached in the case last cited, the Commission cited the parties in the case of *W. S. Duncan & Co. et al.* v. *N. C. & St. L. Ry. et al.* to appear and show cause why the order theretofore issued therein should not be changed and modified so that it would require the defendants therein to

cease and desist from discriminating in any respect whatever between Nashville, Tenn., and Atlanta, Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome, and Athens, all located in the State of Georgia, and the shippers, consignees, and dealers, respectively, with respect to transit and reshipping privileges and practices as pertaining to grain, grain products, and hay, upon the ground that such discrimination was undue, unreasonable, and unlawful. After a full hearing on this order to show cause, the Commission made the order complained of in this proceeding.

The Commission, in concluding their report which resulted in said order, used the following language:

"After a careful consideration of all the pertinent facts and circumstances, we are of the opinion and find that the matters and things complained of herein constitute the undue and unreasonable preference and advantage and the undue and unreasonable prejudice and disadvantage as between the parties to this proceeding prohibited by Section III of the act to regulate commerce."

We may start, then, with the proposition admitted that the reshipping privilege existing at Nashville is not unlawful in itself or the Commission would not have framed the order in the alternative. (*Penn Refining Co.* v. *W. N. Y. & Penn. R. R.*, 208 U. S., 208.) The discussion of the whole matter seems to be narrowed to two propositions: (1) Is the reshipping privilege existing at Nashville a violation of Section III of the interstate commerce act with reference

to the Georgia points mentioned in the order? (2) The Commission having found that it is a violation of said section, may this court review said finding? Section III, above referred to, so far as material to the present inquiry, is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The undisputed facts which gave rise to the establishment of the reshipping privilege at Nashville by the N. C. & St. L. in 1872 and by the L. & N. in 1877 are substantially as follows:

Nashville is located on the Cumberland River about 190 miles above its confluence with the Ohio River, and the Cumberland is navigable below Nashville for about nine months in the year. The navigable season corresponds with the season for the handling of grain crops. Atlanta is located 289 miles southeast of Nashville, and none of the Georgia points mentioned in the order of the Commission are on any navigable stream connecting them with the Mississippi, Ohio, or Cumberland Rivers. Before there were any rail connections between Nashville and the river gateways, such as Cincinnati, Louis-

ville, Evansville, Paducah, Cairo, Hickman, etc., and before there was even any rail connection between any of these river crossings and Atlanta and the Southeast, the Nashville & Chattanooga Railroad was completed from Nashville to Chattanooga as early as 1854. The cities of Charleston and Savannah contributed largely to the completion of this road and its connections with Atlanta and the seaboard for the purpose, expressed at the time, of connecting the cotton-producing section of the country with the grain fields of the West. The line from Charleston to Atlanta and Nashville was the first line and was and still is the shortest line from the Southeast to the western grain country, and was completed before there was any other rail connection between Nashville and the Southeast on the one hand and Cairo, Evansville, Louisville, or Cincinnati on the other. The Nashville & Chattanooga Railroad, as soon as it was completed to Nashville, was the means by which grain and all western commodities were sent into the Southeast. All this traffic of necessity came from the Wabash, Ohio, and Mississippi Rivers and up the Cumberland River by steamboat to Nashville, and was there loaded upon the cars of the Nashville & Chattanooga Railroad, the only rail line into the Southeast at that time.

This movement of grain caused Nashville at that early day to become the concentration point for grain moving through Nashville as the first real gateway, and over the Nashville & Chattanooga Railroad as the first rail line into the Southeast having direct

connections with the western waterways. Vast amounts of grain and other commodities were gathered in this way at Nashville by the boats of the Cumberland River, and transshipped by this first rail line to Atlanta and other points in southeastern territory. This was long before Cincinnati, Louisville, Cairo or Paducah or any of the other river crossings were grain gateways or concentration points for this trade. There were no rail connections north or west of Nashville until the L. & N. finished its line between Louisville and Nashville in 1859.

At this time the L. & N. Railroad did not extend south of Nashville, and that road did not acquire any line south of Nashville until it leased the road from Nashville to Decatur in 1871, and completed the same to Montgomery in 1879. The Nashville & Chattanooga Railroad did not own a line west and north of Nashville until 1872, when it began to operate 171 miles of railroad running from Nashville west, crossing the Tennessee River at Johnsonville, Tenn., and going to the Mississippi River at Hickman, Ky. This road then became interested in the hauling of grain and other commodities all the way from the Mississippi and Ohio Rivers on the west to Atlanta and southeastern territory. Prior to that time, the Nashville & Chattanooga Railroad had no interest in how the grain came to Nashville from the Mississippi and Ohio Rivers.

After the Nashville & Chattanooga Railroad became the owner of the line of road from Hickman to Nashville it constructed and put in operation free

elevators on the Tennessee River at Johnsonville and on the Mississippi River at Hickman, and by so doing sought to attract shipments of grain moving from the Mississippi and Ohio Rivers to its 171-mile haul to Nashville, and then to carry it to the Southeast. It was found, however, that notwithstanding the establishment of the free elevators at the points indicated, most of the grain from the Wabash, Mississippi, Ohio, and Cumberland River Valleys continued to come into Nashville by boat on the Cumberland River. The boat and rail rate from the Wabash, Ohio, and Mississippi River grain-producing valleys, via Hickman and Johnsonville, to Nashville, was higher than the all-river rate accepted by the boats upon grain from these grain sections up to Nashville. The N. C. & St. L. Railroad was therefore obliged to take some steps to meet this situation in order to protect its railroad running from Nashville west, and to procure the longest possible haul from the grain-producing sections aforesaid to the grain-consuming territory in the Southeast.

The N. C. & St. L. Railroad could have done this in either one of two ways. It could have fixed and accepted a very low local rate from the river crossings up to Nashville, thus meeting the steamboat competition; or it could have established a through rate from the river crossings to the Southeast via Nashville, protecting this through rate by extending the privilege of reshipping at Nashville. It chose to follow the latter course in order better to subserve and protect its revenues. A very low local rate up to

Nashville would have unnecessarily sacrificed revenue. This low rate would have been applicable to all the grain locally consumed at Nashville or points based on Nashville, and if the road had unduly reduced the local rate up to Nashville to meet the steamboat competition it would have been impossible to maintain the existing scale of rates on other commodities besides grain which were going to Nashville in large quantities for local consumption. This was the origin of the reshipping privilege which has existed for forty years at Nashville. It was caused by competition in the shipment of grain from the Mississippi and Ohio Rivers by boat to Nashville on the Cumberland River.

The Cumberland River still exists, and Nashville is still located upon it. For all practical purposes, the situation, so far as competition on the Cumberland River is concerned, is the same potentially as it was in 1872. We must not deceive ourselves by believing that the L. & N. and the N. C. & St. L. extended this reshipping privilege to shippers and dealers at Nashville as a favor to the shippers and dealers or as a favor to Nashville. The simple truth is that the railroads extended the privilege to these shippers and dealers so as to obtain the shipment of grain from Mississippi and Ohio River crossings over their own lines.

The crucial question then is: Were the L. & N. and the N. C. & St. L. compelled to extend the reshipping privilege to grain dealers at Nashville in order to successfully compete with the transportation of grain,

grain products, and hay on the Cumberland River? If they were, then the law of the land declares that the granting of the privilege to Nashville and not to Atlanta, where no such competition existed, would not be a violation of Section III of the act to regulate commerce.

We may not annul the order for the reason, if it be so, that Nashville ought to be classed and equalized with Mississippi and Ohio River crossings, nor may we annul it for the reason that Nashville is a natural concentration point or primary market for grain, if it be so, nor on the ground that Nashville is the proper place for stoppage of grain in order to protect the grain itself by handling and drying. We must annul the order, if at all, upon the ground that upon the undisputed facts the law declares that there is no violation of Section III of the act to regulate commerce.

We think that the undisputed facts demonstrate that the reshipping privilege was extended to shippers and dealers at Nashville on account of the competition on the Cumberland River, and on that account alone, and that the undisputed evidence would not support any other finding upon that proposition. It is alleged that the railroads bought into the situation at Nashville and therefore can not be heard to say that they were compelled to meet the Cumberland River competition. This reasoning would prohibit the building of all railroads, as no one would build a railroad if it were to be held that all competition met in the operation of the same should be

considered voluntary because the road had been voluntarily built. The unsoundness of such argument does not require demonstration.

In *East Tennessee, Virginia & Georgia Railway Co.* v. *Interstate Commerce Commission* (181 U. S., 18) the Supreme Court, speaking of the section of the interstate commerce law involved in this case, used the following language:

"The prohibition of the 3rd section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."

In the same case the Supreme Court said:

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on

the other, because in the supposed cases the preference is not 'undue' or the discrimination 'unjust.' This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make the lesser charge. Indeed, the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville."

It is true that the language last above quoted was used in reference to the influence of competition on Section IV of the interstate commerce act before its amendment, but the same reasoning must apply with equal force to cases under Section III, for it has been uniformly held by the courts that the prohibition contained in Section IV is but one of the kinds of competition denounced by Section III. (*Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 197; *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S., 144; *L. & N. R. R.* v. *Behlmer*, 175 U. S., 648.)

In the recent case of *Interstate Commerce Commission* v. *Diffenbaugh* (222 U. S., 42) and *Peavey & Co.* v. *Union Pacific R. R. Co.* (176 Fed., 423) it was held that the payment of an elevator charge by a railroad company which is compelled by competition is lawful. The Interstate Commerce Commission itself has

in a large number of cases recognized competition, and especially water competition, as influential upon the establishment of reasonable rates. (*Commercial Club of Omaha* v. *Chicago Ry. Co.*, 7 I. C. C. Rep., 404; *Raworth* v. *Northern Pacific R. R. Co.*, 3 I. C. C. Rep., 862; Chattanooga Board of Trade, 10 I. C. C. Rep., 133; *E. Sonheimer Co.* v. *Ill. Cen. R. R. Co.*, 17 I. C. C. Rep., 60; *Bulte Milling Co. et al.* v. *Chicago & Alton R. R.*, 15 I. C. C. Rep., 351; *Monroe Progressive League* v. *St. L. I. M. & S. Ry.*, 15 I. C. C., Rep., 534; *Indianapolis Freight Bureau* v. *P. R. R. Co.*, 15 I. C. C. Rep., 567; *Columbia Grocery Co.* v. *L. & N. R. R.*, 18 I. C. C. Rep., 502.)

It is earnestly claimed, however, that as the Interstate Commerce Commission found that this reshipping privilege at Nashville was a discrimination against Atlanta and the other Georgia points, that this court is concluded by that finding. In the case of *A. T. & S. F. Ry. Co. et al.* v. *Interstate Commerce Commission* (188 Fed., 229) this court said:

"In other words, as in this case, where all the facts are undisputed, we do not think the Commission can by an ultimate finding based upon the undisputed facts preclude this court from reaching a conclusion of its own upon such undisputed and admitted facts. When the facts are undisputed, there is no occasion for the facts to be found, and the ultimate conclusion of the Commission is a mixed question of law and fact which certainly ought not to be held to be conclusive upon this court."

Where the facts of a case are admitted and the question is what the judgment of a tribunal shall be upon such admitted facts, the case stands in the same position as if the facts had been found and the question should arise as to what should be the judgment upon the facts so found. This is always a question of law. So in the present instance, the facts being undisputed, the question arises whether these facts show a violation of Section III, and the solution of the question involves a consideration and interpretation of said section which is peculiarly a question of law and within the power of this court to decide.

In *Interstate Commerce Commission* v. *Union Pacific R. R.* (222 U. S., 541) it was said by the Supreme Court:

"There has been no attempt to make an exhaustive statement of the principles involved, but in cases thus far decided it has been settled that the orders of the Commission are final unless inter alia * * * (3) based upon a mistake of law."

Again, in the case of *State of Washington ex rel. Oregon R. R. & Navigation Co.* v. *H. A. Fairchild et al.*, the question was presented as to whether, as a matter of law, the facts proved showed the existence of such a public necessity as authorized the taking of property, and the Supreme Court held in that case that the facts did not show the existence of such public necessity, although the Railroad Commission of the State of Washington had found otherwise. The Supreme Court cited the cases of

Kansas City Railway Co. v. *Albers Commission Co.*, *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, and *Graham* v. *Gill*, decided by that court but not yet officially reported.

Our conclusion in regard to the whole case is that under the facts appearing in the record the reshipping privilege at Nashville is not in violation of Section III, nor a discrimination in favor of Nashville as against Atlanta and the other Georgia points, and that the facts being undisputed it is within the undoubted power of this court to so declare as a matter of law applicable to such a state of facts.

The order of the Interstate Commerce Commission complained of in this proceeding will therefore be annulled and the motion to dismiss denied. And it is so ordered.

HUNT, *Judge*, dissenting.

United States Commerce Court.

No. 49.—October Session, 1911.

Lehigh Valley Railroad Company, petitioner

v.

United States, respondent, Interstate Commerce Commission and Henry E. Meeker, intervening respondents.

ON MOTION FOR PRELIMINARY INJUNCTION.

Mr. Frank H. Platt, with whom *Mr. E. H. Boles*, *Mr. John G. Johnson*, and *Mr. Everett Warren* were on the brief, for the petitioner.

Mr. Blackburn Esterline, special assistant to the Attorney General, with whom *Mr. James A. Fowler*, Assistant to the Attorney General, was on the brief, for the United States.

Mr. Charles W. Needham, for the Interstate Commerce Commission.

Mr. William A. Glasgow, jr., for intervening shipper.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[Oct. 12, 1911.]

Per Curiam:

Without expressing any opinion as to whether the petition and supporting affidavits disclose a

state of facts which if established on the trial of the case would entitle the petitioner to the relief prayed for, it is the judgment of the court, in view of the matters set forth in the report of the commission, which is made a part of its order, and the presumptions of the validity of the order, that the motion for a preliminary injunction should be denied, and it will be so ordered.

United States Commerce Court.

Nos. 50 and 51.—October Session, 1911.

Atchison, Topeka & Santa Fe Railway Co. et al., petitioners, *vs.* United States of America, respondent.	No. 50.
Union Pacific Railroad Co. et al., petitioners, *vs.* United States of America, respondent.	No. 51.

Interstate Commerce Commission, City of Spokane et al., Chicago Association of Commerce, Portland Chamber of Commerce et al., Interior Counties Freight Bureau of Southern California et al., Giroux Consolidated Mines Company, interveners.

ON MOTIONS FOR PRELIMINARY INJUNCTIONS AND ON MOTIONS TO DISMISS.

For opinions of Interstate Commerce Commission see 21 I. C. C. Rep., 329 and 400.

Mr. Charles Donnelly, Mr. F. C. Dillard, and *Mr. Robert Dunlap,* with whom *Mr. T. J. Norton, Mr. E. C. Lindley, Mr. R. B. Scott, Mr. Burton*

Hanson, Mr. James C. Jeffery, Mr. H. A. Scandrett, Mr. W. F. Herrin, and *Mr. Gardiner Lathrop* were on the brief, for the petitioners.

Mr. J. N. Teal for cities of Seattle, Tacoma, and Portland.

Mr. James A. Fowler, Assistant to the Attorney General, and Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. H. M. Stephens for city of Spokane et al.

Mr. Byron Waters for Interior Counties Freight Bureau of Southern California et al.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[Nov. 14, 1911.]

MACK, *Judge:*

These cases involve the constitutionality and interpretation of section 4 of the act to regulate commerce of February 4, 1887, as amended June 18, 1910 (36 Stat., 539), and the powers of the Interstate Commerce Commission thereunder.

The sections as originally framed and as amended follow in parallel columns. The omissions from the original section and the additions in the amended section are italicized.

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensa-	SEC. 4. (*As amended June 18, 1910.*) That it shall be unlawful for any common carrier subject to the provisions of this act to charge or re-

tion in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge *and* receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission *appointed under the provisions of this act*, such common carrier may, in special cases, after investigation *by the Commission*, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section *of this act.*

ceive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act;* but this shall not be construed as authorizing any common carrier within the terms of this act to charge *or* receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the *Interstate Commerce* Commission such common carrier may in special cases, after investigation, be authorized *by the Commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further, That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be*

changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

At the time of the amendment a number of complaints of unreasonable and unjustly prejudicial rates filed by commercial bodies of the so-called intermountain cities, such as Spokane, Washington; Reno, Nevada; and Phoenix, Arizona, were pending before the Commission. Similar complaints had been filed and partial adjustments thereof made at various times, beginning with the year 1892. Because of the amendment, the Commission refrained from finally determining the commodity rates to which these cities were entitled

on west-bound traffic, believing that orders made under applications for relief, as provided in section 4, would obviate the necessity therefor.

Applications were duly filed in a form prescribed by the Commission, which required carriers to state that the rate to the intermediate points should not be more than a certain number of cents per 100 pounds, per ton, per car, or per package, in excess of the rates to the farther point, in and by which applications the carriers asked to be allowed to maintain the Pacific coast terminal rates then in force, lower than the rates to intermediate points fixed by specified tariffs on file with the Commission.

After a full hearing and investigation two reports and orders were made. Each report was entitled in the matter of the application under section 4. One of them was also entitled in the matter of the then pending Nevada and Arizona complaints (21 I. C. C. Rep., 329), although the order based thereon was entitled only in the matter of the applications under section 4; the other report was also entitled in the matter of the then pending Spokane and Salt Lake City complaints (21 I. C. C. Rep., 400), although the order based thereon was entitled only in the matter of the Spokane complaint.

The first order provided that for the purposes of the disposition of the applications the United States should be divided into five zones (being the same as those specified in a Transcontinental Tariff on file), as follows:

Zone No. 1 should comprise all that portion of the United States lying west of a line called Line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma State line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 should embrace all territory in the United States lying east of Line No. 1 and west of a line called Line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Huron; passes westerly through the Straits of Mackinac; southerly through Lake Michigan to its southern boundary; follows the west boundary of Transcontinental Group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 should embrace all territory in the United States lying east of line No. 2 and north of the south boundary of Transcontinental Group C, and on and west of line No. 3, which is the Buffalo-Pittsburgh line from Buffalo, N. Y., to Wheeling, W. Va., marking the western boundary of Trunk

Line Freight Association territory; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 should embrace all territory in the United States east of line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 should embrace all territory south and east of Transcontinental Group C.

The order then proceeded as follows:

"*It is further ordered,* (1) That those portions of the above-numbered applications that request authority to maintain higher commodity rates from points in Zone No. 1 to intermediate points than to Pacific coast terminals be, and the same are hereby, denied, effective November 15, 1911; (2) that petitioners herein be, and they are hereby, authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3, and 4, as above defined, to points intermediate to Pacific coast terminals that are higher to intermediate points than to Pacific coast terminals; provided, that the rates to intermediate points from points in zones numbered 2, 3, and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific coast terminals by more than 7 per cent from points in Zone No. 2, 15 per cent from points in Zone No. 3, and 25 per cent from points in Zone No. 4.

The Commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation, and correction if they conflict with any other provisions of the act."

The second order is similar in all respects except that it refers only to Spokane and certain other intermountain cities, and expressly provides that

the carriers shall comply therewith for a period of not less than two years.

The two suits brought in this court to enjoin the enforcement of these orders, respectively, were heard together. The same questions are presented in each of them.

First. We agree with the Commission that section 4 of the act to regulate commerce as amended June 18, 1910, is constitutional. The Commission concedes, and we concur therein, that if the first proviso in this section is to be literally construed and if, under such construction, no limit has been imposed upon and no standard given to guide the exercise of the Commission's discretion in granting authority to depart from the rule forbidding a lesser rate for the long than for the short haul in the same direction and over the same line or route, the proviso would be unconstitutional as an unlawful delegation of legislative power. We concur, too, in the Commission's view that if the proviso were for this reason illegal the entire section would thereby be nullified, inasmuch as both the context and the history of the act demonstrate that the proviso is an integral part of the section, and that a hard and fast rule absolutely prohibiting such a lesser rate would not have been enacted.

To determine, however, the true meaning of the proviso, the entire act must be examined. In the light of the other sections, and of the legislative and judicial history of the long and short haul clause, we are of the opinion that the guide to the exercise

of the Commission's discretion is to be found in the other sections of the act, thereby making the discretion to exempt carriers from the prohibition in fact not unlimited, and imposing upon the Commission not merely the right but also the duty to grant such exemption whenever, on investigation, it shall find that no violation of any section of the act would thereby be involved.

If, therefore, the proposed rate, lower for the long than for the short haul, violates no provision of the act, and if, in particular, it neither tends to produce an unreasonable rate for the short haul nor operates unduly to prejudice the short-haul point and unduly to prefer the long-haul point, it is the duty of the Commission to grant exemption from the hard and fast rule laid down in the first clause of section 4.

Second. The orders sought to be enjoined do not establish absolute rates for either the long or short haul or prescribe the extent, in dollars and cents, that the short-haul rate may exceed the present or some definitely fixed long-haul rate, but they do establish a relation between *any* long-haul rate that the carrier may put into effect and the short-haul rate, determining that from zone one the western short-haul rate shall not exceed the long-haul rate, and that from zones two, three, and four, the short-haul shall not exceed the long-haul rate by more than 7%, 15%, and 25%, respectively.

The Commission found specifically that the Pacific coast rates from part of this eastern territory

were forced by water competition, and that the rates from other parts were forced by market competition; for example, that the railroads based the New York-Seattle rate on the ocean competition and that they granted the same rate from St. Paul to Seattle in order to enable St. Paul to compete with New York in the Seattle market.

Under the fourth section as originally framed, it was decided (*E. T., etc., Ry. Co.* v. *I. C. C.*, 181 U. S., 1, and cases cited therein) that carriers might, in the first instance and without application to the Commission, make the rate less for the long than for the short haul, if, in fact, the circumstances and conditions were not substantially similar, taking their chances on a subsequent determination by a court that they had erred in so doing and had thereby violated the law. They could, however, and in many instances did, apply to the Commission for the authority. After the section was construed as not requiring such an application in the first instance, the carriers, it was often charged, abused their privilege by making the rate for the long haul less than for the short haul, although the circumstances and conditions were substantially similar; this charge was, in any event, one of the causes that led to the amendment of the section whereby the clause "under substantially similar circumstances and conditions" was eliminated therefrom. The practical change thereby produced in section 4 was to compel the carriers to

make application to the Commission if they desired to continue this practice.

The violation of the long and short haul rule is, however, only one instance — a most striking and irritating one, it is true — of the preference and prejudice which, when undue, is prohibited by section 3. Any violation of the original fourth section would necessarily involve a violation of the third section and, *e converso,* if the lesser rate for the long haul than for the short were not in violation of the third section it could not be in violation of the original fourth section. In *E. T., etc., Ry. Co.* v. *I. C. C., supra,* the court held that when it is established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and that the lesser rate for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates can not be held to be, in legal effect, the voluntary act of the carriers, and that therefore the provisions of the third section will not apply. The prohibition of the third section, it was said, is directed against undue preference arising from the voluntary and wrongful act of the carriers, and does not relate to acts the result of conditions wholly beyond the control of such carriers; the lesser rate for the long haul could not produce an unjust preference under the third sec-

tion when the competitive conditions at the longer distance point which had caused the lesser rate would produce the same preference, even though the carrier were forbidden to meet the competition. For example, as Seattle can get its supplies from New York by water, and Spokane, because of its location, can not do so, Seattle can not be said to be unduly favored merely because the rail carrier, in order to meet the water competition, charges a lesser rate from New York to Seattle through Spokane than from New York to Spokane, provided the Spokane rate is reasonable per se and the Seattle rate not unremunerative. And so, too, if the St. Paul-Seattle rate is reduced to a point less than reasonable per se although not unremunerative, to meet the New York-Seattle rate in order to enable the St. Paul merchants to compete with New York merchants at Seattle, Spokane could not complain merely because this rate is made less than the St. Paul-Spokane rate. In each of these cases Spokane is not unduly prejudiced, because if the lower rail rate to Seattle were forbidden Seattle would nevertheless, by reason of its location, be able to secure its supplies by water, and would therefore in the nature of things have this advantage over Spokane.

While the primary question in the E. T., etc., Ry. Co. case, supra, was as to the right of the carriers, in the first instance and without application to the commission, to make lesser rates for the long than

for the short haul, inasmuch as the original complaint charged a violation of both the third and the fourth sections, the court necessarily considered section 3, and held that it could not be violated by making a lesser charge for the long than for the short haul, if the long-haul rate was forced by competition and was not unremunerative.

This construction of section 3 was not dependent upon the clause in section 4 which, by the amendment of 1910, has been stricken out. It was based upon the language of section 3 itself, which forbade not any preference but only an undue preference, and upon the determination that, in the nature of things, there could be nothing undue in a preference which was caused by the natural geographical situation, and which would continue even if there were no railroad carriage. The amendment to section 4, therefore, has not changed the construction of section 3, and it follows that no unjust prejudice to Spokane and other interior points can now be predicated merely on the fact that the rate from any of the eastern territory is less to the Pacific coast terminals than to the intermediate points.

The Commission also found, however, that the present Pacific coast rates from zone one had not been proven by the carriers, upon whom the burden was laid, to be less than reasonable *per se.* Assuming that they were fully reasonable *per se,* the Commission would have the power to refuse exemption from the long and short haul requirement,

for under these circumstances any higher rates to intermediate points could be condemned as unreasonable and thus in violation of section 1 of the act.

But the order of the Commission as to this territory is not limited to a denial of the applications in the form in which they were presented, that is, to a denial of the maintenance of the then prevailing rates to the coast concurrently with higher rates to the interior points. It forbids the carrier to maintain *any* coast rate lower than the contemporaneous intermediate rate from these points. In other words, if the carrier from St. Paul in order to meet new water competition from New York should reduce the St. Paul-Seattle rate to a point less than at present and less than a rate reasonable *per se,* but nevertheless somewhat remunerative, it would be compelled, under this order, to grant the same rate to the interior point, even though, under these circumstances, a reasonable rate to the interior point higher than the unreasonably low rate to the coast point forced upon the carrier by such market competition under penalty of losing the business would not be in violation of section 1 or of any other provision of the act.

This is likewise true of the order as to rates from the other zones. It is not based upon the current coast rates. It determines the relation of the short-haul rates to *any* coast rates that might be established by the carriers. It makes illegal a rate from Chicago to Spokane more than 7 per cent higher

than an unreasonably low but remunerative Chicago-Seattle rate forced by competition, even though the Chicago-Spokane rate be reasonable *per se* and not in violation of any provision of the act.

Is the Commission empowered to make such an order? It is urged that even if it must grant an application for relief, when the lower long-haul rate involves no violation of the act, nevertheless it may determine the extent of the exemption and therefore it may fix the relation of rates.

But to sustain the constitutionality of the proviso in section 4 it must be read as imposing the duty on the Commission not only to grant exemption from the hard and fast rule when thereby no section of the act is violated, but also to grant such exemption to the extent that no section of the act is thereby violated; that is, the carrier is entitled under the act to be granted authority to charge as much less as it please for the long haul than for the short haul, provided the Commission shall first determine that it does not thereby violate any other provision of the law. In granting authority to make an absolute long-haul rate lower than some short-haul rate, the Commission would have the power and the duty to prevent a violation of section 1 and, by virtue of its authority to determine reasonable rates, to fix the short-haul rate.

Doubtless the Commission could, moreover, in order to prevent a violation of section 3, make relative rates in so far as this might be necessary to pre-

vent an undue preference. For while, under the decision in *E. T., etc., Ry. Co.* v. *I. C. C.*, supra, undue preference could not be predicated merely on the fact that the rate was less for the long than for the short haul, when the former was forced by water, market, or any kind of competition, it might be predicated thereon if the short-haul rate were not likewise based upon the same competition in so far as and to the extent that it ought fairly to be influenced thereby. For example, if the St. Paul-Seattle rate be made less than reasonable although remunerative to meet the forced New York-Seattle rate so as to enable St. Paul to compete with New York in the Seattle market, Spokane might complain of unreasonable prejudice against it if the St. Paul-Spokane rate were made higher than the New York-Spokane rate and thereby similar competition were prevented at Spokane. So, too, as its merchants could get their supplies through Seattle at a price based on the New York-Seattle freight rate plus the back-haul rate, Spokane might have grounds for complaint of undue prejudice if the rate either from St. Paul or New York to Spokane were made higher than the rate from such point to Seattle plus the back haul, because only to the extent of the back-haul cost could Spokane be said to be in any different position than Seattle, and therefore only to that extent could it justly be deprived of the benefits of the same competitive forces which determine the Seattle rate.

But neither the equality of rates on shipments from zone 1 nor the relation between the rates on shipments from the other zones, as fixed in the order of the Commission, can be sustained upon any such considerations. In so far as the Commission attempts thus to determine the relation of the long and short haul rates, irrespective of absolute rates, it goes beyond any authority that has been vested in it, for it is not in the power of the Commission to say that 100 per cent, 107 per cent, or any given percentage of an unknown less than reasonable rate to the coast is necessarily a maximum reasonable and non-discriminatory rate from the same point of origin to an interior point.

The practical effect of the Commission's order is either to compel a blanket rate from the entire east to the entire west, or to prevent the carriers from getting all the business which they now secure without loss by making rates which enable merchants to meet market competition. For example, if the forced New York-Seattle rate is $1, the St. Paul-Seattle rate can not be made higher by the St. Paul carrier, unless it gives up the benefit of business which market competition at Seattle might bring to it. As long as it charges no one else an unreasonable rate, and as long as it does not carry under cost, it is entitled to grant St. Paul the market competitive rate of $1. Under the order, its rate to Spokane in that event could not exceed $1, while the New York carrier could charge

$1.25. The latter, however, would also have the right to enable New York to meet St. Paul competition in Spokane. To do this it would have to reduce the New York-Spokane rate to $1. The result would be either to compel a blanket rate from all points east of St. Paul to all competitive points west of St. Paul or to force the carriers to give up some business which could be carried without loss to themselves or damage to anyone else. The Commission's order, moreover, does not even secure to Spokane the market competition of St. Paul and New York, since it empowers the railroads to charge a higher rate from New York, which might exclude New York from the Spokane market.

In a word, unless some through business is given up, the effect of the orders would be to put Spokane and other interior points on an equality with Seattle and other Pacific coast points, at least from zone one,—a position to which they would not be entitled under all circumstances in view of their relative locations, the former four hundred miles more or less in the interior, the latter on the coast.

It follows that the motions to dismiss the petitions must be denied and that writs to enjoin the enforcement of the orders, pending the final determination of the cases, must be issued. And it is so ordered.

ARCHBALD, *Judge,* concurring:

It is conceded that if the right to approve or disapprove of an application by a carrier to charge more for a shorter than for a longer haul is left by

the fourth section of the interstate commerce act, as it is at present amended, to the uncontrolled discretion of the Commission, the section is invalid; also, that the proviso taken as it reads in terms confers such unlimited discretion; and that the section is only therefore to be saved in case a guide is found in other provisions of the statute.

"That section provides," says Mr. Commissioner Prouty, "that no carrier shall charge more for the short than for the long haul unless upon application to the Commission permission to do so is granted by it. If this section were read by itself and were taken at its literal face meaning, the Commission would possess unrestricted power to grant or deny such application. It could permit in one case and refuse in another, according as its fancy might dictate. So construed, the proviso would probably be void as a delegation of legislative authority. The making of rates is a legislative function. To say whether a carrier shall or shall not be allowed to charge more for the short than for the long haul is virtually the making of rates, and therefore an attribute of the legislature. To invest an administrative body like this Commission with that unrestricted and unguided authority would be to give it legislative power, which can not be done under our Federal Constitution. It is one thing to authorize such a body to administer the law in accordance with certain rules and standards prescribed by the legislature and an entirely different thing to turn over to it the exercise of the legislative

48250—S. Doc. 789 62-2—30

discretion itself." Proceeding to consider whether the proviso could be separated from the rest of the section and the prohibitive part of it, where the charging of more for a shorter than for a longer haul over the same line in the same direction is forbidden, be sustained without regard to it, it was further held that the proviso was an essential part of the section which manifestly would not have been enacted without it, and that the whole must therefore stand or fall together. This is a correct exposition of the law, and could not have been better stated than is done in the opinion of the Commission. But I do not see how, in the face of it, to escape the conclusion that the section is invalid. It is sustained by the Commission by importing into it the provisions of the first and third sections, which respectively prohibit unreasonable rates and unjust discriminations, where the requisite guide is found, as it is claimed, for the action of the Commission. "Bearing in mind," says the same learned and able Commissioner, "the authority which the Commission now administers in prescribing a reasonable rate and in declaring and correcting an undue preference, it seems evident that the purpose of Congress was to commit to this body the duty of determining whether if the carrier was permitted to charge a higher rate at the intermediate point that would result in a violation of the provisions of the act. But in so doing the Commission can not act arbitrarily. It must investigate each case, and if after such investigation it is of the

opinion that a departure from the rule of the fourth section would not result in unreasonable rates or undue discrimination it must permit that departure. If, upon the other hand, it is of the contrary opinion, it must refuse the permission. Such is the only possible construction which can be put upon this section in connection with the entire act, and if any doubt as to the real purpose of Congress could exist, it must be effectively put at rest by an examination of the history of the passage of this measure."

Undoubtedly the statute is to be taken as a whole and the different sections read together, but I fail to see how this helps out the matter. By the first section it is prescribed that all charges for any service rendered or to be rendered by carriers subject to the act in the transportation of passengers or property shall be just and reasonable, and every unjust and unreasonable charge is prohibited and declared unlawful. This does no more than enact the common into the federal law, and neither adds to nor detracts from the rights of such carriers, except as it inferentially recognizes their right to a just and properly remunerative rate, in prohibiting an unjust and unreasonable one. But how does this assist the Commission in any given case whether to enforce or relieve the carrier from the greater short than long haul charge prohibited by the first part of the section in question, or what direction or guide to that end does it afford? No doubt it insures to the carrier that the short-haul charge shall

be reasonably remunerative where it has not been voluntarily abandoned, although the Commission in the order made has entirely disregarded this. But that is only half of the problem to be solved, if, indeed, it is that much. The point is that it affords no guide in determining when a disparity between the short and the long haul shall be permissible, which is the question which in each case is to be decided by the Commission. But it is further said that at this juncture the third section comes in, and authorizes a less charge for a long than for a short haul, provided an undue or unreasonable preference or advantage does not result to any person or locality over any other. But this provision of the statute is not permissive, but prohibitive. It forbids in brief any undue discrimination, as the first forbids unjust or unreasonable rates, or the fourth the particular kind of discrimination against which it is leveled. It may be, correlatively or by inference, that a right to discriminate is recognized when it can be done without injustice or prejudice. But how again does this afford a guide to the Commission in determining when a greater short than long haul charge shall be sanctioned? The fourth section in express terms declares that except as extenuated by the action of the Commission a greater short than long haul charge is per se a discrimination and advantage which is unjust and undue, and not to be tolerated. And how is it possible, then, to say that a prohibition against what is undue furnishes a guide or rule in determining

when it shall result that that which so on its face is to be regarded as undue shall no longer be so? There shall be no undue discrimination, says the third section. A greater short than long haul charge is an undue discrimination, says the fourth. At what, then, do you arrive by combining the one with the other? Or where is here to be found the criterion or standard which is to enable the Commission to say when and under what circumstances that which it is bound otherwise to say is an unjust and undue preference or advantage of one locality over another is not so? All the guide there is, is its say-so. But if it rests merely on that the enactment is confessedly void, and the action of the Commission has nothing to sustain it. And that is the only conclusion which I can reach with regard to it. It is held good by the court for the reasons given by the Commission, but to this I can not agree, and feel compelled in consequence to give expression to the views which I entertain to the contrary. There are at least such grave doubts with regard to the validity of the section that the question might well be passed by at this time, there being other grounds upon which the invalidity of the action of the Commission may be rested.

For there can be no reasonable doubt that, assuming that the fourth section is valid, the orders of the Commission go far beyond the power conferred by it. The authority given by the proviso is upon application of the carrier in *special cases* after investigation to permit the charging of less for longer

than for shorter distances, the Commission having the right from time to time to prescribe the extent to which the carrier may be relieved from the absolute prohibition against this, which is otherwise imposed upon it. There must thus in each instance be an application by a carrier, and a special case which entitles the carrier to relief—whatever that may mean—must be set up and made out. And this fixes the limits of the Commission's authority. Its duty is to investigate what is so brought before it, and, if a case warranting it appears, to approve the application; or if not, to refuse it. The Commission can not go on if it does not approve and make rates, or lay down rules by which they shall be made, upon its own initiative. The carrier in making application for approval does not submit or subject itself to any such exaction. The right to inaugurate to this extent still remains with the carrier the same as before the amendment. The authority assumed by the Commission here is not to be implied from the right to prescribe the extent to which from time to time the carrier may be relieved, in the words of the statute. This refers to the special case in each instance which the carrier is required to make out in order to get the approval of the Commission, and is necessarily confined to it. In this respect the phraseology of the section is not changed, and it never by any previous construction was carried outside of this, nor is there anything now which requires it. It may be that the appli-

cations made by the carriers here for the approval of existing long and short haul tariffs, blanketing the country, went beyond the statute. But if that was the case, the proper course to pursue was to throw them out upon that ground. The mere fact that they were in this form gave the Commission no authority to go on and prescribe rates by the wholesale. The orders in controversy extend to the entire continent from east to west, saving only a comparatively small section in the southeast, which is reserved for subsequent consideration. This can not by the broadest construction of the law be brought within it. By no device can the whole United States be made a " special case "; nor can the Commission, upon any just conception of its powers, lay down a hard and fast rule which shall apply to every long and short haul case wherever originating or whatever its destination from east to west across the country. Nor is this saved by the establishment of zones with varying percentages. As pointed out in the opinion of the court, this entirely disregards the right of the carriers to have considered what in each instance is a reasonable rate between points involved. It also overrides the established right of the carriers to make a less than reasonable rate to and from competitive points from whatever cause that competition arises. And it is an attempt to overcome the advantages possessed by coast over inland cities in the face of what nature has provided. All this is fully discussed in

the opinion of the court, in which I fully concur, and to which I can add nothing of consequence. For these reasons, without regard to any others, the orders of the Commission were clearly invalid, and an injunction against them is properly to be granted, the motion to dismiss being necessarily overruled as the consequence. But I can not see my way to go beyond this and declare the fourth section valid, on which, if anything is to be said, my opinion is to the contrary.

United States Commerce Court.

No. 54.—April Session, 1912.

Anaconda Copper Mining Co. and Boston & Montana Consolidated Copper and Silver Mining Co., petitioners,

v.

United States of America, Respondent, Interstate Commerce Commission and Pittsburgh & Lake Erie Railroad Co., et al., interveners.

ON MOTIONS TO DISMISS.

Mr. William A. Glasgow, jr., and *Mr. Charles D. Drayton*, with whom *Mr. James M. Beck* and *Mr. C. F. Kelley* were on the brief, for the petitioners.

Mr. Winfred T. Denison, Assistant Attorney General, with whom *Mr. Thurlow M. Gordon*, special assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. George Stuart Patterson and *Mr. Frederic D. McKenney*, with whom *Mr. Ora E. Butterfield*, *Mr. W. Ainsworth Parker*, and *Mr. R. Walton Moore* were on the brief, for the intervening carriers.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[June 7, 1912.]

CARLAND, *Judge:*

Petitioners are corporations engaged respectively at Anaconda and Black Eagle, in the State of Montana, in smelting ores containing copper, silver, and gold. On April 21, and March 11, 1909, they filed with the Interstate Commerce Commission nine separate petitions against certain carriers by railroad wherein it was prayed that the Commission grant an order compelling said carriers to cease and desist from charging petitioners and other shippers of coke over their lines of road from points in the State of West Virginia to Chicago and South Chicago, in the State of Illinois, 30 cents per hundred pounds in excess of the amount charged to other persons and corporations shipping coke contemporaneously between the same points, intended for use in smelting iron from the ores, and also that the petitioners be awarded reparation. Such proceedings were thereafter had in the matter of said petitions that on December 12, 1910, the Commission made its report and order dismissing the same.

The Commission found that the carriers had tariffs in accordance with which they charged, from the ovens in West Virginia and Pennsylvania to Chicago and certain Chicago points, a rate of $2.35 per net ton on coke when used for smelting iron from the ores; that said carriers in their tariffs charged for the transportation of coke between the points named, when used for other purposes than the smelting of iron from the ores, a rate of $2.65 per net ton; that the rates assessed upon the shipments shown to have

been made by the petitioners were the separately established or joint through rates from the West Virginia-Pennsylvania ovens to Chicago, plus the rates beyond to Anaconda and Black Eagle, Montana. At no time during the period that said shipments were made was there a joint through rate on coke by way of Chicago from the West Virginia-Pennsylvania ovens to either of these destinations; that, while some shipments were made to Montana direct, most of the coke moved from the ovens to Chicago, where it was reconsigned to the complainants. In either case the method of assessing and paying the freight charges was identical; that is, the coke rate from the ovens to Chicago was carried forward and paid at destination as advanced charges, and that it was improper for carriers to base their charges upon the use to which a commodity may be put.

The Commission further found, upon the question of reparation, as follows:

"The question remains to be determined whether the complainants are entitled to reparation, regardless of whether the $2.65 rate was or is unjust or unreasonable in and of itself. The complainants contend that it is illegal, unlawful, and contrary to the act for said defendants to charge a different or greater rate for transporting coke based upon its use, and that the $2.65 rate was unjust, unreasonable, and discriminatory. They offered no evidence whatever to show or prove that the $2.65 rate was in and of itself unjust, unreasonable, or discriminatory, save what appeared on the face of the tariffs, and left the unjust-

ness, the unreasonableness, and discrimination to be deduced or inferred as a matter of law. The freight-traffic managers of the defendants testified that the $2.35 rate was a very low rate, and that the $2.65 rate was a just and reasonable rate for the service performed and was not in any manner excessive. The average distance from the ovens to Chicago by the lines of the defendants is about 575 miles, and the $2.65 rate yields an average revenue of 4.6 mills per ton-mile.

"Since July, 1903, the open rate on coke over all lines from the ovens in Pennsylvania and West Virginia to Chicago has been $2.65 per net ton. This rate has been, and is, the basing rate from said points of origin to Chicago, and for all territory, both east and west thereof, and has been paid by all consumers of foundry and other than furnace coke continuously during the past seven years, and no complaint has ever been made against it until these proceedings were instituted for reparation. The lower rate of $2.35 per net ton for use in blast furnaces for smelting iron from the ores was a tariff reduction, effective not earlier than July, 1905, and has been applied only to Chicago and vicinity, and is a very low rate for the service performed, and in and of itself is not deemed conclusive evidence of the unjustness or unreasonableness of the $2.65 rate.

"Copper and iron can not fairly be said to compete with each other in view of the fact that iron sells for less than $20 per ton and copper for anything between $200 and $500 per ton. There is no pretense in this

case that the complainants were engaged in smelting iron from its ores. The allegation in some of the petitions, that the complainants were engaged in smelting ores containing copper, silver, gold, and iron, does not place them under the terms of the tariffs providing for the rate on blast-furnace coke, and no effort was made on the part of the complainants to show that they ever actually smelted iron from its ores.

"In view of all the facts and circumstances in these cases, we are not convinced that the rate of $2.65 per net ton charged the complainants was either unjust or unreasonable for the services rendered by the defendants."

Petitioners have brought this case for the purpose of having annulled and set aside the order of the Commission dismissing the petitions in the above-mentioned cases. A motion to dismiss the petition in this case has been filed by respondent and by each of the intervening respondents. The grounds upon which said motion to dismiss is based, speaking generally, are: Want of jurisdiction of the Commerce Court in the premises, and the failure of the petition herein to state a cause of action. Counsel for petitioners claim in this court, as they did before the Commission, that when it appears that there was one rate of $2.35 per net ton on coke from West Virginia-Pennsylvania ovens to Chicago when the coke was to be used in smelting iron from the ores, and another rate of $2.65 per net ton between the same points on coke to be used for other purposes

than the smelting of iron from the ores, it clearly follows as a matter of law that the $2.65 rate is unlawful, unreasonable, and unjust, and that petitioners were entitled before the Commission to have an award based upon their shipments of the difference between the two rates, the petitioners having paid the higher rate.

The Commission having refused to sustain this claim of the petitioners, they now urge that the order of the Commission dismissing their petitions was illegal by reason of a mistake in law, and that this court may correct the same by setting aside the order of dismissal.

We do not think that we are called upon to decide what the law would be if applied to a case where there was no finding by the Commission as to the unreasonableness of either rate, for the reason that as appears from the report of the Commission there was evidence introduced by the carriers and otherwise appearing in the case as to the reasonableness of the $2.65 rate, and the Commission in the exercise of a power clearly vested in it by law, having found that the $2.65 rate was not unreasonable and unjust, we are of the opinion that we have no authority nor jurisdiction upon the present record to disturb that finding, and that the Commission having found that said rate of $2.65 was not unjust and unreasonable in and of itself, we can not say as a matter of law that because there was a lower rate charged on coke used in smelting iron from the ores that the petitioners were injured within the meaning of section 8 of the act to

regulate commerce. (*Knudson-Ferguson Fruit Co.* v. *M. C. R. Co.*, 148 Fed., 968; *Parsons* v. *C. & N. W. Ry. Co.*, 167 U. S., 447; *E. Lauer & Son* v. *Southern Pacific Co.*, 18 I. C. C., 109; *Bash Fertilizer Co.* v. *Wabash R. Co.*, 18 I. C. C., 522; *Copper Queen Consolidated Mining Co.* v. *B. & O. R. R.*, 18 I. C. C., 154; *Anaconda Copper Mining Co.* v. *Chicago & Erie R. R. et al.*, 19 I. C. C., 592; *International Salt Co.* v. *Penn. R. Co.*, 20 I. C. C., 539; *Carter White Lead Co.* v. *Norfolk & Western R. Co.*, 21 I. C. C., 41; *M. A. Kennedy & Co.* v. *St. L. & S. W. Ry. Co.*, 22 I. C. C., 277.)

It further affirmatively appears in the record that petitioners as to shipments of coke were not in competition with persons or corporations to whom the lower rate was charged, and this fact was considered a bar to a recovery in the following cases: *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.* (181 Fed., 403), *Charles H. Lilly Co.* v. *N. P. R.* (117 Pac. Rep., 401).

Upon the question of jurisdiction we see no reason for departing from our ruling in the cases of *Thompson Lumber Co.* v. *Interstate Commerce Commission et al.* (193 Fed., 682), and *Russe & Burgess* v. *Interstate Commerce Commission et al.* (193 Fed., 678).

Upon the facts in the record we think we must dismiss the petition of the petitioners filed in this court, and it is so ordered.

United States Commerce Court.

No. 55.—April Session, 1912.

Crane Iron Works, petitioner,

v.

United States, respondent, Interstate Commerce Commission et al., interveners.

ON MOTIONS TO DISMISS.

For opinions of Interstate Commerce Commission see 15 I. C. C. Rep., 248, and 17 I. C. C. Rep., 514.

Mr. William A. Glasgow, jr., and *Mr. Cyrus G. Derr*, with whom *Mr. Charles F. Diggs* was on the brief, for the petitioner.

Mr. Winfred T. Denison, Assistant Attorney General, with whom *Mr. Thurlow M. Gordon*, special assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Jackson E. Reynolds for the Central Railroad Company of New Jersey, intervener.

Before Knapp, Presiding Judge, and Archbald, Carland, and Mack, Judges.

[JUNE 7, 1912.]

KNAPP, Presiding Judge:

The petitioner in this case, the Crane Iron Works, instituted proceedings before the Interstate Commerce Commission against the Central Railroad Company of New Jersey and the Crane Railroad Company to procure an order requiring the defendant railroads to establish through routes and joint rates on certain commodities between points on the Crane Railroad and points in the State of New Jersey on the lines of the Central Railroad; and also for reparation on account of previous shipments. After full hearing the Commission made a report (17 I. C. C. Rep., 514) to the effect that petitioner was not entitled to the relief sought, and thereupon entered an order dismissing the proceedings.

Thereafter this suit was brought to set aside and annul the Commission's order of dismissal on grounds which will be hereafter stated. The United States filed a motion to dismiss on the ground that the petition did not state a cause of action, and a like motion to dismiss was filed by the Commission which had intervened. On these motions the case has been argued and submitted.

There had been a previous application to the Commission for the same purpose by the Crane Railroad Company, which the Commission also dismissed, as appears by its report and order therein (15 I. C. C. Rep., 248). Both reports are attached to and made a part of the petition now before us, and from these

reports and the petition itself the following facts appear:

The petitioner is a corporation organized under the laws of Pennsylvania and located in the borough of Catasauqua, in that State. It was incorporated about the year 1895 for the purpose of acquiring the plant and property of the Crane Iron Company, which had for many years carried on the business denoted by its name. At that time the plant consisted of three blast furnaces, together with appurtenant buildings, storage bins, etc., and a private railroad connected with the works. It does not appear when this railroad was constructed or when it was extended to connect with exchange tracks of the Central Railroad and other long-line carriers; but it does appear to have been in use for the purposes of the iron plant for more than thirty years.

In the operation of this plant it is necessary to transport loaded cars received by rail to various points within the limits of the plant for unloading, to transport cars which have been loaded with its product from various points within the plant to the line of railway by which they are taken to destination, and also to some extent necessary to move cars from point to point within the plant itself. For these purposes the iron works long ago laid down rails extending from a connection with the Central Railroad to the various points within its plant where cars were to be placed. The line of the Central Railroad extends through the premises of the iron works and the

point where the two railroads connect is now and always has been upon the iron works' land. The iron works also provided the necessary locomotives for operating the various tracks which it had built to accommodate the needs of its plant. In actual operation loaded cars destined for the iron works were placed by the Central Railroad upon a track known as the exchange track, from which they were taken by the locomotives of the iron works and hauled to the required point within its plant. When cars were loaded for movement out they were taken by the same locomotives and placed upon the exchange track, where the Central Railroad received and transported them to destination. These locomotives were also used for moving cars from point to point within the plant as might be desired.

For this service the petitioner has never received and, until the organization of the Crane Railroad, had never claimed that it should receive compensation from the Central Railroad. Indeed, it seems to have been assumed that these tracks and engines were a necessary part of the plant of the iron works whose business could not be properly carried on without them.

In process of time a few other industries, perhaps half a dozen, were located in close proximity to the premises of the iron works, though not upon its land, and these industries were so situated that loaded cars could be transported between the tracks of the Central Railroad and the industry only over the rails of the Crane Iron Works. For the purpose

of serving these industries, the Crane Iron Works extended its rails beyond its own land to these several plants. Cars for these industries were placed upon the same track with those intended for the iron works and taken by the locomotives of the iron works over the rails of that company to the several industries. For this service the iron works made a charge to the industry which seems to have been usually two dollars a car. The different railroads bringing these cars to Catasauqua, including the Central Railroad, paid to the iron works towards defraying this charge at first five cents and subsequently six cents per ton. This condition seems to have continued for many years, during which time, as above stated, the iron works neither claimed nor received any compensation for handling its own freight.

Under the statutes of Pennsylvania a private railroad cannot connect with a public railroad except for handling the business of the owners of the private railroad, and the iron works was advised that it had no lawful right to perform this switching service for the other industries. Accordingly, in 1905, the Crane Railroad Company was incorporated, and the tracks and other property used by the iron works in connection with its railroad were conveyed to the Crane Railroad Company, together with a strip of land ten feet wide wherever its rails were laid upon the land of the iron works and also whatever rights of way it might have in reaching the other industries in question. The capital stock of both

the Crane Iron Works and the Crane Railroad Company is owned by the Empire Iron & Steel Company, and the management of the Crane Railroad Company after the incorporation continued in the same manner as before, although the operating accounts of the two companies were kept entirely separate.

Although the Crane Railroad Company was organized in 1905 it did not begin business on its own account until the following year, since which time it has charged both to the other industries and to the Crane Iron Works two dollars per car for this switching service, and it is insisted that the various railroads entering Catasauqua should absorb this switching charge. The Central Railroad has declined to make any allowance on account of cars handled for the Crane Iron Works, but has made an allowance of six cents per ton on traffic consigned to or from the other industries.

The principal contention of petitioner appears to be that the Crane Railroad Company is a common carrier subject to the provisions of the act to regulate commerce and the jurisdiction of the Commission; that this was conclusively established by the evidence before the Commission; that the Commission, in failing to find the fact accordingly and leaving it undetermined, committed an error of law; that as such common carrier the Crane Railroad Company is legally entitled to compensation for the transportation service which it is alleged to perform for petitioner; and that therefore it was error of law for the Commission to refuse the relief which the petitioner sought to

secure. Incidentally, and in support of the main contention, it is further claimed that the dismissal order was erroneous because the undisputed evidence established as matter of law unjust discrimination on the part of the Central Railroad of New Jersey, in that it pays the Crane Railroad, out of the tariff charge which it collects, for transporting cars to and from the other industries located on the tracks of the Crane Railroad, but refuses to pay anything for transporting cars to or from the Crane Iron Works.

The Crane Railroad Company is organized under the railroad law of Pennsylvania; which, among other things, declares that all railroads so organized shall be common carriers. In that State it has undoubtedly the legal status of a common carrier, with such privileges and obligations as pertain to railroad corporations in Pennsylvania. It is not necessary to discuss whether the Crane Railroad is in fact a common carrier within the meaning of that term as used in the act to regulate commerce, because we shall assume for the purposes of this case that it is a common carrier subject to the act, and the matters in dispute will be decided on that assumption.

But granting all that is claimed in this regard, it does not follow, as we think, that petitioner is therefore entitled to have joint rates established, or that the dismissal order of the Commission is for any reason unlawful. The substantive basis of petitioner's contention is the following provision in the first section of the act: "And it shall be the duty of every carrier subject to the provisions of this act * * *

to establish through routes and just and reasonable rates applicable thereto." It will be observed that the obligation to establish "joint rates" is not imposed, but only the obligation to establish "through routes," with just and reasonable rates applicable thereto. Undoubtedly, connecting carriers are required to facilitate the movement of traffic by providing through routes, but the application of joint rates to such routes is not obligatory except as required by the Commission after notice and hearing. If through routes are voluntarily established the rates fixed for transportation over such routes are subject to the regulating power of the Commission; and the Commission *may* require joint rates to be provided, fixing the amount thereof and the divisions between the several carriers when they are unable to agree among themselves.

If the Crane Railroad be regarded as performing the service of a public carrier, a service which the shipper is not required to provide, and not a private service which the shipper must furnish at its own expense, we see no reason to doubt upon the facts now disclosed that through routes in this case have been provided and are in full operation. All the facilities of interchange and through movement are in current use, and traffic in fact moves freely from points on one road to points on the other. Indeed, we do not perceive that anything more or different could be done by either road to bring about the physical conditions and incidents which constitute through routes.

The authority of the Commission to require joint rates is found in a paragraph in the fifteenth section of the act, which reads as follows:

"The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line."

That this invests the Commission with discretionary power, and was so intended, can not be seriously doubted. Not only is the grant of authority permissive in form but the entire paragraph contemplates the exercise of judgment upon the facts disclosed, and implies the right and duty of the Commission to order or decline to order joint rates, as the circumstances and conditions developed in each inquiry may seem to require. The provision for a hearing upon complaint, or the equivalent initiative of the Commission, involves the liberty and obligation of the administrative tribunal to decide a controversy of this nature upon its merits with due regard to the interests of both shippers and carriers. In short, it seems clear to us that the question of establishing joint rates or declining to do so rests in the discretion of the Commission, and it is equally clear that the refusal of the Commission

in this case was a lawful and proper exercise of that discretion.

But the dismissal order in question rests upon another basis, which will be briefly considered. Upon all the circumstances connected with the location, construction, and operation of the Crane Railroad, the Commission found as an ultimate fact that, as to the Crane Iron Works, it was a mere plant facility, performing services which the iron works should perform for itself if it desired such services, and that the Central Railroad was under no obligation to pay the Crane Railroad for the switching service which it performs for the iron works and, indeed, could not lawfully do so. We see no reason to doubt the correctness of this conclusion. The Commission had previously pointed out the distinction between those operations which constitute a plant facility and the legitimate services of a common carrier (*General Electric Company* v. *N. Y. C. & H. R. R. R. Co. et al.*, 14 I. C. C. Rep., 237; *Solvay Process Company* v. *D., L. & W. R. R. Co.*, 14 I. C. C. Rep., 246), and the observations made in these illustrative cases seem to us to express a sound and wholesome principle. That there was substantial evidence to sustain the finding of the Commission as to the character of the services rendered is not open to reasonable question, and, this being so, the conclusion must be accepted accordingly.

But the argument is earnestly pressed that such a relation can not as matter of law be predicated of an incorporated railroad which is declared to be a common carrier by the fundamental law of the State

of its creation. In other words, it is insisted that the Crane Railroad, being in law a common carrier and performing the functions of a common carrier, can not be a plant facility of the Crane Iron Works, but must be regarded as a common carrier for the Crane Iron Works, and entitled as a matter of legal right to a just share of the transportation charge which the Central Railroad makes and collects for carrying the traffic of the iron works; and on this theory it is argued that the finding and conclusion of the Commission involve an error of law which this court should correct.

We are constrained to reject this contention. Whether the Crane Railroad is a plant facility as to the Crane Iron Works or a common carrier of the traffic of that concern must be held to be a question of fact which is not affected by the circumstance of incorporation. We understand it to be admitted that the operations of this railroad when it was owned and operated by the iron works were the operations of a plant facility. It is contended, however, when the railroad was separately incorporated and passed from the ownership of the iron works, that its relation to the latter and the legal character of its services became immediately changed. That is to say, the mere fact of the separation of ownership and the transfer of the title and control of the railroad property to a new corporation, although there was not the slightest change in what was actually done, operated in legal effect to transform a plant facility into a common carrier and to impose obligations on

the Central Railroad, as to the traffic of the iron works, which it could not theretofore have been required to assume. We can not believe that any such result was accomplished. The rights and duties of the Central Railroad respecting the iron works could not thus be altered. If its obligations as a common carrier were fully discharged and its tariff rate earned by delivering cars to and taking them from the exchange tracks before the iron works parted with its railroad, its rights and duties respecting that concern were neither increased nor diminished by the creation of the Crane Railroad. The services rendered to the iron works continuing to be precisely the same in point of fact, this railroad continued to be utilized as the facility of the iron works' plant in the same way after as before incorporation.

Nor do we perceive any serious objection to regarding a given agency as a plant facility of a particular shipper, although a common carrier as to other shippers. Whether considered from the standpoint of law or of practical administration, it seems reasonable to hold, as the Commission virtually held in this case, that a railroad of the kind in question may have this dual character and perform services for one concern which are not the services of a common carrier, but which that concern is bound to provide for itself, notwithstanding it occupies the relation of a common carrier to other concerns and the public generally. Concededly, the work which the Crane Railroad does in moving cars between different points in the iron works' plant has none of the inci-

dents of common carriage, and why may not the same thing be affirmed of the work it does in switching cars for the iron works to and from the exchange track with the Central Railroad, even if the work it does for the other industries makes it as to them or the shippers of Catasauqua a common carrier?

It is unnecessary to discuss the charge of discrimination except to say that the Commission has found, upon evidence which is clearly substantial, that the refusal of the Central Railroad to pay switching charges on traffic handled for the Iron Works, while at the same time paying switching charges on traffic handled for the other industries, is not an undue prejudice to the one or an undue preference to the others.

In the concluding paragraph of the report upon which the dismissal order is based the Commission summarizes the situation as follows:

"The complaint attacks certain rates as unreasonable and asks for the establishment of certain joint rates between definite points. The complainant [petitioner] does not contend that these rates are unreasonable except by the amount of this switching charge, nor does it ask for the establishment of joint rates except for the purpose of compelling the defendant [Central Railroad] to pay the Crane Railroad for the performance of this switching service. Since we hold that the delivery by the defendant [Central Railroad] is completed when cars are placed upon the interchange track and that defendant [Central Railroad] owes no duty to the complainant [petitioner] to receive loaded cars from it until they are put upon that track, there is no occasion to examine in detail the rates referred to."

Upon the whole case we are of opinion that no error of law was committed by the Commission in denying the petitioner's application. It follows that *the motions to dismiss the petition should be granted, and it will be so ordered.*

United States Commerce Court.

No. 57—February Session, 1912.

United States of America, ex rel. Stony Fork Coal Co. et al., petitioners, United States, intervener,

v.

Louisville & Nashville Railroad Co. et al., respondents.

On petition for peremptory writ of mandamus.

Mr. T. G. Anderson for petitioners.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, for the United States, intervener, in support of the jurisdiction of the court.

Mr. Albert S. Brandeis and *Mr. William A. Northcutt* for the Louisville & Nashville Railroad Co.

Mr. Alfred P. Thom and *Mr. John K. Graves* for the Southern Railway Co.

Before Knapp, Presiding Judge, and Archbald, Hunt, Carland, and Mack, Judges.

[March 20, 1912.]

Carland, *Judge:*

November 15th, 1911, petitioners filed their petition in this court, praying for a writ or writs of mandamus directed to the respondents, commanding

them and each of them to perform their duties as common carriers in the matter of the transportation of coal. Upon the filing of the petition an alternative writ of mandamus was ordered to issue by the court. The alternative writ, however, was not issued, but in place thereof a copy of the order allowing the same was served on the respondents, together with an order to show cause, returnable December 5th, 1911. Each respondent answered the petition filed, and the case was subsequently heard upon the petition and the answers of respondents.

At the hearing, the Louisville & Nashville Railroad Company moved to dismiss the petition for want of jurisdiction. Petitioners moved for judgment on the pleadings. The following material facts appear therefrom:

The Stony Fork Coal Company, Ralston Coal Company, Monarch Coal & Coke Company, and Hignite Coal Mining Company own and operate coal mines in Bell County, Kentucky. The Louisville & Nashville Railroad Company and the Southern Railway Company are common carriers engaged in the transportation of freight, including coal, from coal fields and coal mines on their lines of railroad in the State of Kentucky to stations and points in the States of Tennessee, North Carolina, South Carolina, Georgia, Alabama, Florida, and Mississippi, which said last-mentioned States are known for the purposes of transportation as southeastern territory.

Middlesborough is a town in Bell County, Kentucky, in what is known as the Middlesborough district of

the bituminous coal fields of southeastern Kentucky. The Stony Fork Coal Company owns and operates a coal mine about nine miles west of Middlesborough at a station or point known as Stony Fork. The Ralston Coal Company owns and operates a coal mine about eight miles west of Middlesborough at a station or point known as Capito. The Monarch Coal & Coke Company owns and operates a coal mine about seven miles west of Middlesborough at a station or point known as Wilmont. The Hignite Coal Mining Company owns and operates a coal mine about eight miles west of Middlesborough at a station or point known as Covert.

Eighty per cent of the total output of said mines is sold in southeastern territory. Each respondent operates a line of railroad from Middlesborough to said territory. The route to the said southeastern territory over the line of the Louisville & Nashville Railroad from the petitioners' coal mines is so long and circuitous that said railroad company can not compete in the handling of coal traffic with the shorter and direct route via the Southern Railway, and publishes no rates over its said route applicable to said coal traffic. Said company, however, owns and operates a line of railroad commonly known as the Middlesborough Railroad, extending from a point at or near its Middlesborough depot to Stony Fork Junction, a distance of about 2.98 miles, and from said junction up the Stony Fork of Yellow Creek, a distance of about 7.83 miles, this line being known as the Stony Fork Branch. The Southern Railway has

48250—S. Doc. 789, 62-2——32

the right by contract to use the Stony Fork Branch line jointly with the Louisville & Nashville Railroad. The stations or points where the petitioners' mines are located are situated on said Stony Fork Branch, and are designated as points of origin in the tariffs hereinafter mentioned. The Louisville & Nashville Railroad Company has from time to time published joint and concurrent tariffs and duly filed the same with the Interstate Commerce Commission as prescribed by law, establishing through routes and joint rates on coal from said stations or points on the Stony Fork Branch, viz, Stony Fork, Capito, Wilmont, and Covert, to stations or points in the various other States mentioned and designated as southeastern territory. Said through route is via the Louisville & Nashville Railroad to Middlesborough, and thence via Southern Railway to points of destination; said joint tariff being only applicable to such through route. The Southern Railway Company has duly published and filed with the Interstate Commerce Commission, Southern Railway Company coal tariff 8–ICC–A–4500, effective October 15th, 1911, in which said tariff the Louisville & Nashville Railroad Company is named as a participating carrier, and in which said last-named carrier has concurred according to law. Said Southern Railway tariff 8–ICC–A–4500 names the points or stations where petitioners' mines are located as points of origin for the shipment of coal, and said tariff advertises to the world that said Southern Railway will transport coal from said points of origin to southeastern territory for the rates therein mentioned.

The Southern Railway Company contends that it is under no obligation as a common carrier or otherwise to furnish transportation at the points of origin mentioned, or with respect to shipments over the Stony Fork Branch to Middlesborough, because it is not the initial carrier, and admits that it has not furnished and will not furnish cars to the petitioners at such points unless compelled to do so by competent authority. The Louisville & Nashville Railroad does not acknowledge any legal or moral obligation to furnish cars or transportation to the petitioners for the shipment of coal from the points above mentioned to southeastern territory for the reason that it only performs a switching service for the Southern Railway in transporting coal from said points of origin to Middlesborough, and refuses to transport the coal of petitioners further than to Middlesborough. By reason of this dispute between the carriers the petitioners are deprived of the means of transporting their coal to the southeastern territory, and their business is destroyed save for a comparatively small amount of local shipments to local Kentucky points.

Petitioners have repeatedly requested respondents to transport their coal to southeastern territory, but said requests have been continually refused, and by reason thereof petitioners have been obliged to cancel all orders for coal from said territory, and are now excluded from the systems of both respondents and placed in the position with respect to said southeastern territory of being on no railroad line whatever,

instead of having the use and benefit of two railroads, or at least one.

It is alleged in the petition that respondents are, and each of them is, receiving freight, including coals, and transporting the same from all other stations and points and for all other shippers and mines in Bell County, Kentucky, to said southeastern territory. For the purpose of petitioners' case it is not necessary that said allegations be wholly established. We think it sufficient to show discrimination if it appears that respondents are transporting coal of other shippers from practically the same territory at the same rates to southeastern territory, and at the same time are refusing to transport the coal of petitioners.

It is true that the foregoing allegation is denied in the answers of respondents, but we think the denial, so far as the transportation of coal is concerned, is destroyed by the fact that it appears from the admissions in the answers that both respondents are shipping coal from other mines in Bell County to the southeastern territory. Especially is this true when it appears from the record that respondents are operating jointly the line of road known as Bennett's Fork Branch, running up Bennett's Fork of Yellow Creek from Stony Fork Junction.

Briefly stated, the case made by the petitioners is this: They own and operate coal mines located upon the line of the Louisville & Nashville Railroad, known as the Middlesborough Railroad, which extends to Middlesborough, Ky. The Southern Railway Company owns a line of road running from Middlesborough

to the so-called southeastern territory, and has the right to operate the Stony Fork Branch of the Middlesborough Railroad. The Southern Railway has filed with the Interstate Commerce Commission and published according to law a joint tariff and established through routes from the points on the Middlesborough road, where petitioners' mines are located, to southeastern territory. The Louisville & Nashville Railroad has concurred in the tariff and through route established by the Southern Railway, and is named in said tariff as a participating carrier. Said carriers transport coal from other mines and for other shippers in Bell County, located in practically the same territory as those of the petitioners, to southeastern territory.

In this condition of affairs the Louisville & Nashville Railroad refuses to move and transport the coals of the petitioners to southeastern territory for the reason that in connection with the traffic mentioned it simply performs a switching service, and that it is not its duty to furnish cars for any greater distance than to transport the coal to Middlesborough. The Southern Railway Company refuses to transport the coals of petitioners for the reason that it is not the initial carrier and therefore is not obligated to send its cars up to the points where are located the petitioners' mines to there receive the coal, and that its whole duty is performed when it furnishes the cars at Middlesborough.

But the petitioners are not interested in this dispute between the carriers except in so far as it pre-

vents them from having their coal transported, and only ask that these common carriers, having established through routes and joint rates from petitioners' mines to southeastern territory, shall perform their duty as such common carriers and move the coals of the petitioners in interstate commerce.

This court has no jurisdiction to consider the question of car distribution in advance of some action by the Interstate Commerce Commission, or to determine how many cars the Southern Railway shall furnish, or how many the Louisville & Nashville Railroad shall furnish, for the transportation of the petitioners' coal. It is believed, however, that this court has the undoubted jurisdiction upon the facts presented by the record to issue a writ or writs of mandamus directed to these common carriers, commanding them that so long as they establish and maintain through routes and joint rates to southeastern territory they shall move and transport in interstate commerce the coals of the petitioners when tendered in such reasonable quantities as may be determined either by agreement with the carriers or by the Interstate Commerce Commission if they can not agree.

We will now consider the objections made to our jurisdiction to grant any relief under the facts stated, and also as to what relief shall be granted if we have jurisdiction.

At the inception of this case the Attorney General of the United States did not take part therein. Subsequently he was allowed to intervene in behalf of the

petitioners. If there was an allegation of the petitioners that the application was now made by the Attorney General for a writ or writs of mandamus against the respondents at the request of the Interstate Commerce Commission, we would have authority to grant such writ or writs if the facts should warrant us in so doing, under section 20 of the act to regulate commerce. This section only requires proof of a violation of some provision of said act.

In the absence, however, of any showing that the application is now made by the Attorney General at the request of the Interstate Commerce Commission, we must act, if at all, under section 23 of the act. By subdivision 4, of section 1, of the act creating this court, we are given jurisdiction of "all such mandamus proceedings as under the provisions of section 20 or section 23 of the act entitled, 'An act to regulate commerce,' approved February 4th, 1887, as amended, are authorized to be maintained in the Circuit Court of the United States."

Section 23 of the act, so far as material, reads as follows: "The Circuit and District Courts of the United States shall have jurisdiction, upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier of any of the provisions of the act to which this is a supplement, and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged or upon terms or conditions as favorable as those given by said common carrier for like traffic under

similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier to move and transport the traffic or to furnish cars or other facilities for transportation for the party applying for the writ." This section not only requires that there must be some violation of the act to regulate commerce, but this violation must be one which prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged or upon terms and conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper. In other words, the violation of the act to regulate commerce on the part of the carrier must be such a violation as will amount to discrimination.

By section 1 of the act to regulate commerce as amended June 18th, 1910, it is provided as follows:

"The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all service in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto, and to provide reasonable facilities for operating such through routes,

and to make reasonable rules and regulations with respect to exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto."

Again, by section 3 of the act it is provided: "Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith."

By section 7 of the same act it is also provided: "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, *or by other means or devices*, the carriage of freights from being continuous from the point of shipment to the place of destination."

Considering the above provisions of the act to regulate commerce as applied to the facts in this case, it cannot be doubted that the respondents are violating some if not all of those provisions. It also necessarily follows that such violation is preventing the petitioners from having interstate traffic moved by respondents upon terms or conditions as favorable as those given by said respondents for like traffic under similar conditions to any other shipper.

It is objected that we may not issue a writ or writs of mandamus in this case for the reason that the refusal to transport the coals of petitioners at all is not such a discrimination as is contemplated by the language of section 23; and that in order to come within the purview of said section the carrier must be actually transporting interstate traffic but not upon terms or conditions as favorable to one shipper as are given to another shipper for like traffic under similar conditions. We believe that this is placing too narrow a construction upon said section. We believe that if respondents are carrying the coals of other shippers from the immediate territory adjoining the petitioners' mines to southeastern territory, and at the same time are refusing to carry the coals of the petitioners at all, they have not only violated the provisions of the interstate commerce act, but such violation prevents the petitioners from having their interstate traffic moved by respondents upon terms or conditions as favorable as those given by said respondents for like traffic under similar conditions to other shippers.

It would lead to an absurd result if the court should be obliged to hold that discrimination might exist if respondents were charging other shippers fifty cents a ton for the transportation of coal to southeastern territory and at the same time were charging petitioners one dollar a ton for the same service, and yet there would not be discrimination if respondents refused to transport the coal of petitioners at all, for any price.

This court is not now concerned with the arrangements which respondents may make for the transportation of petitioners' coal as between themselves. The determination of the question as to whether the Louisville & Nashville Railroad shall transport the coal of the petitioners to Middlesborough in cars of its own, there to be taken by the Southern Railway Company to points of destination in southeastern territory, or whether the Southern Railway Company shall send its cars from Middlesborough up the Stony Fork Branch to be there loaded with the coals of petitioners, and thence transported over the Louisville & Nashville Railroad and the Southern Railway to points of destination in southeastern territory, or whether the Louisville & Nashville Railroad shall ship the coals to Middlesborough from points of origin, there to be changed from the Louisville & Nashville cars to the cars of the Southern Railway, or as to the number of cars the Southern Railway Company may be compelled to furnish to petitioners for the transportation of coal, or the number of cars the Louisville & Nashville Railroad may be obliged to furnish for the same service, nor the number of cars at which the mines of the petitioners shall be rated; these are questions either for the agreement of respondents between themselves or, failing in this, for the administrative action of the Interstate Commerce Commission.

This court is now simply dealing with the plain question of law as to whether the respondents, as common carriers subject to the provisions of the

interstate commerce act, may be compelled to perform a plain legal duty not involving any discretion on the part of the respondents and in the absence of any legal excuse or justification for the respondents to refuse to transport in interstate commerce the coals of the petitioners. It is insisted, however, by counsel for the respondents that by virtue of the decisions of the Supreme Court of the United States in *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426; and *Baltimore & Ohio Railroad Company* v. *Pitcairn Coal Company*, 215 U. S. 481, this court is prevented from granting any relief of the nature prayed for by the petitioners, for the reason that the jurisdiction, if any, to grant such relief is with the Interstate Commerce Commission.

We do not so understand the ruling in the cases cited. In the Pitcairn case the Supreme Court, after holding that the United States Circuit Court could not issue mandamus in the matter of the distribution of cars, for the reason that this was an administrative duty devolving upon the Interstate Commerce Commission, said:

"This conclusion being in reason impossible, it must follow that, construing the provisions of section 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either *to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a*

prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the Commission rendered within the lawful scope of its authority until such orders are set aside by the Commission or enjoined by the courts."

We are firmly persuaded that the facts in the case at bar clearly bring it within the limitation declared by the Supreme Court, the writ of mandamus being issued only to compel the performance of a plain legal duty, a function which the Interstate Commerce Commission could not exercise itself, nor could the Commission take any action that would aid us in the decision of the question of law arising on this record.

It is pertinent in this connection to inquire for what purpose did the respondents agree to establish a through route from the points of origin mentioned in the case at bar to the southeastern territory, and in connection therewith file and publish a joint tariff over said through route for the transportation of coal. It was a clear holding out that such carriers would transport the coals of the petitioners over the route for the rates mentioned in the joint tariff, and so long as they shall maintain the tariff described as 8–ICC–A–4500, or a like tariff, the law will compel them to transport the coals of the petitioners when tendered to them in such reasonable quantities as will enable the respondents to handle the same.

Petitioners desire their coals moved in interstate traffic over the route and to the points in southeastern

territory. They are not primarily concerned with just how the handling of this traffic may be arranged between the Louisville & Nashville Railroad and the Southern Railway. They do desire that the respondents shall be compelled to perform their plain legal duty and move in interstate commerce their coal. The Southern Railway seeks to excuse itself from transporting the cars of petitioners by asserting that it is not the initial carrier, and that when it filed and published coal tariff 8–ICC–A–4500 it was acting as an agent of the Louisville & Nashville Railroad, and did not pretend to say that it would transport the coals of petitioner except as a connecting carrier. The Louisville & Nashville Railroad Company seeks to excuse its refusal to transport the coals of the petitioners on the ground that it simply concurred in coal tariff 8–ICC–A–4500 as a participating carrier, and did not thereby intend to agree to transport the coals of the petitioners any further than to perform a switching service, as it is termed, from the mines in question down to Middlesborough.

But the law as applied to the case overrides this dispute between the respondents as to who shall furnish the cars or as to what proportion of cars shall be furnished by each, and says to the respondents: By your act in establishing a through route and joint tariff from points of origin on the Middlesborough Railroad, or the Stony Fork branch of the same, to the southeastern territory you have placed yourselves

in a position where you must transport the coals of the petitioners to said southeastern territory regardless of your private disputes.

Believing, as we do, that the facts in this case show a refusal on the part of respondents to perform their plain legal duty in the premises, we are of the opinion *that the motion to dismiss made by the Louisville & Nashville Railroad Company should be denied, and that a peremptory writ of mandamus should issue out of this court directed to each of said respondents, commanding them, their officers, and agents, so long as they maintain Southern Railway coal tariff 8–ICC–A–4500, or any like tariff, to transport the coals of the petitioners from the points mentioned on the Stony Fork branch of the Middlesborough Railroad to points of destination in the southeastern territory when tendered by said petitioners in such reasonable quantities as can be handled by said respondents, and it is so ordered.*

ARCHBALD and MACK, *Judges*, dissent.

United States Commerce Court.

No. 59.—April Session, 1912.

Southern Pacific Company et al., petitioners,

v.

United States of America, respondent, Interstate Commerce Commission and Oregon & Washington Lumber Manufacturers' Association, interveners.

ON FINAL HEARING.

For opinion of Interstate Commerce Commission, see 21 I. C. C. Rep., 309.

Mr. F. C. Dillard, with whom *Mr. W. W. Cotton*, *Mr. C. W. Durbrow*, and *Mr. H. A. Scandrett* were on the brief, for the petitioners.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *Mr. Winfred T. Denison, Assistant Attorney General*, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Joseph N. Teal, with whom *Mr. Wirt Minor* was on the brief, for the intervening shippers.

Before Knapp, Presiding Judge, and Archbald, Carland, and Mack, Judges.

[June 7, 1912.]

ARCHBALD, *Judge:*

The rate involved in this case was fixed by the Commission on rough green fir lumber and lath from the Willamette Valley, Oreg., over the Southern Pacific Railroad to San Francisco city and bay points. The rate published by the carrier was $5 per ton, which applied to lumber of all kinds; and this on complaint the Commission sustained as to everything but the cheap grade named. This character of lumber, however, it classified and gave a reduced rate of $3.50 per ton from points on the east side of the Willamette River, with 25 cents added from points on the west side.

The same question was before the Commission in a previous proceeding, where rates of $3.40 and $3.65, respectively, were fixed. (14 Inter. Com. Com. Rep., 61.) But upon being litigated in the courts it was finally decided by the Supreme Court on appeal that, according to the report of the Commission and the course of the proceedings before it, the rate had not been determined by a consideration of what was intrinsically just and reasonable for the service performed, but was reduced upon the theory that the lumbermen having been induced to enter the Willamette Valley on assurances of a low rate were entitled, on the ground of equitable estoppel, to be protected against an advance. (*Southern Pacific Company* v

Interstate Commerce Commission, 219 U. S., 433.) The contention now is that in disregard of that decision, with admittedly no new facts before it, the Commission allowed the same views to prevail, merely raising the rate a fraction, so as to have the semblance of compliance, without really undertaking to determine what was a just and reasonable rate.

It is declared by the Commission in the present report that, "while a large amount of additional testimony was introduced" at the second hearing, bearing upon the issues involved, "no new facts were developed," and that consequently no further discussion of the testimony was required. But this statement is not to be carried too far. And above all it affords no basis for the argument which is made that, taking the same view of the facts, the Commission allowed the same ideas to prevail, making the same disposition of the case as the result. The new evidence undoubtedly was cumulative, and simply carried the case down to the time of the last hearing, thus presenting nothing new or different *in kind* from what had been previously shown, and that is evidently all that the Commission meant. But the consideration given to these facts by the Commission, as bearing on what was a just and reasonable rate, is clear, and sufficiently sustains the conclusion reached.

As pointed out by the Commission the net earnings per mile of the Oregon & California Railroad while the $3.40 rate was in force were much in excess of those of many other strong roads; while the ratio of operating expenses to operating revenues was

materially less; this going to show that no serious consequences to the road would result from this supposedly low rate. Nor, as it is said, having regard to the average haul of this lumber, was the rate per ton per mile unjust, there being many instances where for corresponding distances lower rates were voluntarily put in force. Going on to discuss certain cases relied on by the carrier, in which it was charged that the Commission had allowed rates for the transportation of lumber with which the rate in question unfavorably compared, it was further pointed out that, in all but one of these, the conditions were not analogous, and in that one, all things considered, the rate of 14 cents per hundred pounds, while perhaps yielding more by reason of the low cost of transportation, was distinctly lower in effect than the rate here prescribed. A recent instance investigated by the Commission is also alluded to, where the transportation of lumber for about the same distance as here involved was solicited by a prominent carrier, although its division amounted to but $1.40 per ton. And finally, having regard to the average load per car of rough green fir lumber and the average haul over the Oregon & California road, it was shown that the car mile earnings were 16 cents, while the average car mile earnings for all the roads of the United States for the year ending June 30, 1910, were but 14.9; and that while the exact car mile earnings on all traffic of this road did not appear by the figures furnished by the company, yet an examination of

those figures indicated that the earnings on the lumber in question were nearly, if not quite, equal to the average, although considering the longer average haul they might well be less, from which there could be no doubt that the business at the rate prescribed yielded the carrier a handsome profit above the cost of transporting it. It is upon these and other considerations which are stated that the order of the Commission is expressly based.

It is said, however, that the Commission does not stop with this, but goes on to reassert the right to consider the agreement made by the carrier by which the original $3.10 rate was put into effect, on which the lumber industry of the Willamette Valley was built up, in the face of the decision of the Supreme Court that it had no right to do this; and that, entering into the action of the Commission as it so did, the order is void. This contention is based on the following observations in the report. Referring to the original agreement by the Southern Pacific that rates should be made to San Francisco which would fairly meet the water competition from Portland, it is there said:

"The Supreme Court seems to have understood that the Commission was controlled largely by this consideration and that its real purpose was not to establish a rate just and reasonable, but rather to compel a performance of this agreement and prevent the inequity which would result from its violation. * * * This Commission has never understood that it could dictate the policy of a carrier in the making of its rates, in so far as there was just room for the exercise of a policy. It has several

times explicitly so declared. We have, however, believed that we might consider what the policy of a carrier had been in determining whether the rates resulting from a change in that policy were just and reasonable. It often happens that the very existence of an industry depends upon the rate accorded to it. If, now, a carrier has established a particular rate for the express purpose of enabling an industry to exist, and if, upon the strength of that rate, money has been invested which must be destroyed if the rate is withdrawn, it has been our understanding that this fact might properly be considered in passing upon the reasonableness of the proposed change in the rate. Such fact is not controlling, but is one of the circumstances which may properly be kept in view. It has been our opinion that we might in a proper case order the continued maintenance of a rate upon which the investment of money had been induced, even though we would not in the first instance, as an original proposition, have directed the establishment of that rate.

"The policy of a railroad can not be dictated entirely by its own interest. It can not arbitrarily change that policy from day to day when those changes result in undue hardship to its patrons. The welfare of the public, as well as its own welfare, must be considered. To that extent this Commission has believed that it might control the policy of carriers, and to that extent alone. It is still of the opinion that this must be so unless the property rights of shippers are to rest in the arbitrary whim of the carrier without the right of appeal to any tribunal. We do not understand that the Supreme Court in its decision has held the contrary. But in the present case, to avoid all possibility of question, it has seemed proper to lay entirely out of view everything which transpired between these parties in the nature of contract, agreement, or assurance.

"After full hearing and upon full consideration of the whole matter we are of the opinion that the rate of $5 per ton, in so far as it applies to rough green fir lumber and lath, is unjust and unreasonable, and that

for the future the rate upon these commodities to San Francisco and bay points, as defined in the tariffs of the defendants, should not exceed $3.50 per net ton of 2,000 pounds from points upon the line of the defendant east of the Willamette River, except from the Wendling branch, so called; and that rates from the Wendling branch and from stations upon the west bank of the Willamette River should not exceed $3.75 per net ton."

The Commission is entitled to have this taken exactly as it reads, and there can be no reasonable controversy as to what is so said. There is no suggestion, as before, that by reason of assurances held out to the lumber men the carrier was to be regarded as estopped, and, on the contrary, there is an express repudiation of any such idea. The attempted vindication of the former ruling of the Commission was not necessary to the present decision and might appropriately have been omitted. But it is of no consequence unless it betrayed a contumacious purpose on the part of the Commission, which influenced its decision, and this it is plain could not be reasonably asserted. Not only is there the explicit declaration that everything in the way of agreement or assurance had been put out of view, followed by the statement that upon full consideration the rate of $5 a ton as applied to rough green fir lumber and lath in the opinion of the Commission was unjust and unreasonable, and for the future should not exceed the lower amount named; but the inducing reasons for this are given, as shown above, and sufficiently sustain the conclusion reached. The action of the Commission is thus put upon unexceptionable grounds,

which the observations and criticisms indulged in are ineffective to disturb.

It is further said that there is no justification for classifying rough green fir lumber and lath from the Willamette Valley, all lumber as a rule, regardless of condition or value, taking the same rate between the same points, this being true also on shipments by rail from Portland, with which the Willamette Valley competes. There is no occasion for classification at Portland, as the Commission points out, the cheaper grades of lumber from there uniformly going by water, and the matter thus taking care of itself.

It is said again, however, that this discloses the real purpose of the reduction on this grade of lumber, which is to bring the rate down to the level of water transportation from Portland, with which it is thrown in competition, making the rate thus on its face unjust. It may be that the Commission had the necessities in this respect of the lumber industry of the Willamette Valley somewhat in mind, and that this to a certain extent influenced the result reached. But, as is pointed out by the Commission, rough green fir lumber and lath is the cheapest kind of lumber manufactured, the value per car load not exceeding one-half that of the better grades of dried and dressed. It can not move to market therefore from the Willamette Valley unless it gets an encouraging rate, without which, regardless of competition, it will be left in the woods, or be sent to the scrap heap and burned. It also loads heavier than dry lumber, the average of the one being 60,000 and the other 50,000 pounds to the car,

the discrepancy in the yield of freight per car being thus in part made up. Nor is a classification of lumber based on condition and value altogether unknown in transportation circles, exceptions, according to the exigencies of particular cases, being introduced at times by the carriers themselves. A lower rate than for the higher grades of lumber was thus apparently justified in the present instance by these considerations, if not indeed required, and the only question therefore is whether the reduction was unjust.

In fixing the rate of $3.40 per ton on the former complaint, the Commission was no doubt guided in part by the Portland competitive water rate. This rate was met in the early stages of lumbering in the Willamette Valley by the $3.10 rate, given by the railroad, which at one time prevailed. Taking this as a basis, the Commission found that in later years water charters from Portland ranged from twenty-five to fifty cents per thousand more, and it was therefore considered that $3.40 by rail in comparison might reasonably be charged. On the present hearing this was raised to $3.50, the rate now fixed, a slight advance realizing about $3 additional per car. It may be that in this analysis water competition is given a somewhat prominent part. But not in our judgment to the extent of making the rate thereby reached per se unreasonable and unjust. It is in evidence that, regardless of competition, this cheap grade of lumber, as already stated, could not get to market from the Willamette Valley without a favor-

ing rate, and whether traffic will move at a given rate is always some evidence as to whether the rate responds to the value of the service performed. The Commission had this and the other matters to which reference is made to guide in the conclusion reached. The rate was thus not fixed arbitrarily or without considerations which justified it; and above all not for the purpose of enforcing a policy inaugurated by the carrier, which it was held could not equitably be abandoned; but in the exercise of due judgment, after full consideration of the entire subject, as shown by the reasons given for it; and this being so the order was lawfully made.

The petition will therefore be dismissed with costs.

United States Commerce Court.

No. 60.—February Session, 1912.

Baltimore & Ohio Southwestern Railroad Company and Norfolk & Western Railway Company, petitioners,

v.

United States of America and Cincinnati & Columbus Traction Company, respondents.

Interstate Commerce Commission, intervener.

ON MOTION FOR PRELIMINARY INJUNCTION.

For opinion of the Interstate Commerce Commission, see 20 I. C. C. Rep., 486.

Mr. Edward Barton, Mr. Theodore W. Reath, and *Mr. R. Walton Moore,* with whom *Mr. Joseph I. Doran* was on the brief, for the petitioners.

Mr. Winfred T. Denison, Assistant Attorney General, and *Mr. Blackburn Esterline,* special assistant to the Attorney General, for the United States.

Mr. C. Bentley Matthews for the Cincinnati & Columbus Traction Company.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[April 9, 1912.]

ARCHBALD, *Judge:*

This is a bill to set aside an order of the Interstate Commerce Commission. The proceedings before the Commission were instituted by the Cincinnati & Columbus Traction Company, an electric suburban railway, incorporated under the laws of Ohio, against the Baltimore & Ohio Southwestern Railroad and the Norfolk & Western Railway, two separate trunk lines running east and west across the State of Ohio. The proceedings were taken under the first section of the interstate-commerce act to compel a switch connection at separate points with each of the railroads mentioned, and also to secure through routes and joint rates under the fifteenth section. There was a prayer in the latter connection that the railroads be required to exchange cars and equipment. The Commission in a joint order against both roads substantially granted the relief prayed for.

The provisions of the act with regard to the compelling of switch connections are as follows:

"Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to con-

nect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper *or owner of such lateral, branch line of railroad*, such shipper *or owner of such lateral, branch line of railroad* may make complaint to the Commission, as provided in section thirteen of this act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than the orders for the payment of money."

The words in italics were not in the act at the time the application for the switches in question was made to the railroads, nor at the time of the complaint to the Commission, which followed, but were introduced over a year afterwards, in June, 1910, by way of amendment. At the time the proceedings were instituted, therefore, the traction company had no right to file the complaint, and the Commission, in

consequence, except for the change in the law, would have been without authority to entertain it. *Interstate Commerce Commission* v. *D. L. & W. R. R.*, 216 U. S., 531. After the testimony had been taken, however, and before any order had been entered, in March, 1910, immediately following the decision just cited, the case was reopened at the instance of the traction company to permit two shippers along the line of the road, one at Marathon and the other at Hillsboro, to be added as complainants. This was objected to by the railroads on the ground that it could not overcome the want of jurisdiction when the case originated, and could not in any respect supply the necessary preliminary application in writing, which is required by the statute as the basis of the subsequent proceedings. The Commission overruled the objection, and, having considered the case on the merits, made the following order:

"This case coming on to be further considered, and it appearing that the parties in interest have failed to put in effect the findings made by this Commission in its report herein, dated March 14, 1911, and that the above-named complainant petitions by counsel for an order of relief in the premises:

"It is ordered that defendant The Baltimore & Ohio Southwestern Railroad Company be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the line of the above-named

complainant company at Madeira, Ohio, the expense of installing such connection to be borne by said complainant.

"It is further ordered that said defendant The Baltimore & Ohio Southwestern Railroad Company, be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the line of the above-named complainant company at or near Hillsboro, Ohio, the expense of installing such connection to be borne by said complainant.

"It is further ordered that defendant Norfolk & Western Railway Company be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the lines of the above-named complainant company at or near Hillsboro, Ohio, the expense of installing such connection to be borne by said complainant.

"And it is further ordered that defendants The Baltimore & Ohio Southwestern Railroad Company and Norfolk & Western Railway Company, according as their various lines may run, be, and they are hereby, notified and required to establish and put in force, on or before the 15th day of February, 1912, and for a period of at least two years thereafter to maintain, through routes to and from interstate points to and

from all points on the complainant's line between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of cars under through billing and through charges based upon the rates of the respective carriers herein to and from the junction points established by this order, the complainant carrier having filed its local rates with this Commission as applicable to interstate movements over such through routes."

Several objections are made to this order. In the first place, renewing the one made before the Commission, it is contended that the introduction, while the case was pending before the Commission, of entirely new and different complainants, who had made no previous application for the switches, was beyond the power of the Commission to allow, and vitiates the proceedings. An initial application in writing from the party entitled to make it at the time is essential, as it is said, in order to comply with the statute, and can not be dispensed with nor afterwards supplied, and, with all that has been done, is still lacking. Nor is this met, as it is urged, by the suggestion that the Commission is an administrative body not hampered by rules, and thus competent to reform the proceedings in the way which was done to meet the exigency.

It was also further objected that the Commission failed to determine the compensation to be severally made to the railroads for the switch connection with each which was ordered, having simply directed that

the expense of installation should be borne by the traction company, without more, although the statute requires that, along with the question of the safety, practicability, and justification for the switch connection, the Commission shall determine the reasonable compensation for it.

And it is finally objected that, in excess of its powers or even of Congress itself to require (*Central Stock Yards Co.* v. *Louisville & Nashville R. R.*, 192 U. S., 568; *Same* v. *Same*, 212 U. S., 132), the Commission ordered an interchange of cars along with through billing.

These are serious objections which would have to be carefully considered except for the conclusion which we have reached on the underlying question, viz, whether the traction company's road is a "lateral, branch line of railroad" within the meaning of the statute, which, if found against that company, is conclusive.

The Cincinnati & Columbus Traction Company was organized and is operated under the laws of Ohio as an electric interurban railway and is classified by those laws with street railways, by the provisions for which, and not those for steam railroads, it is controlled and regulated. It was chartered to construct a line of this character from Cincinnati to Columbus, something over a hundred miles, which has actually been built from Norwood, a suburb of Cincinnati, to Hillsboro, about half the distance. It is a common carrier of persons and property, and is also engaged in the transportation of express matter.

The Baltimore & Ohio Southwestern Railroad is a consolidated corporation organized under the laws of Ohio and Indiana, and operating an eastern and western trunk line, through and across those States, into and through the State of Illinois, and also into the State of Kentucky. It reaches Hillsboro by a branch line which connects with its main line, running to Cincinnati.

The Norfolk & Western Railway is organized under the laws of Virginia and operates a line of railway extending through parts of Ohio, West Virginia, Kentucky, Maryland, North Carolina, and Tennessee. It also has a branch line to Hillsboro, which connects with its main line to Cincinnati.

In relative position to the line of the Cincinnati & Columbus Traction Company the Baltimore & Ohio Southwestern is to the north and the Norfolk & Western to the south of it, the traction company's railroad being intermediate between the two and substantially dividing the diamond-like section of territory lying in between them. At Norwood the station of the traction company immediately adjoins that of the Baltimore & Ohio Southwestern, and for about six miles east from there its line not only parallels but is contiguous to the right of way of that railroad, while a few miles further on, at Perinton, it practically adjoins the right of way of the Norfolk & Western, which it similarly parallels for about four miles to Stonelick; and at the other or eastern end, for a distance of some four or five miles, at Hillsboro, it again parallels the tracks of the Baltimore & Ohio

Southwestern, the rights of way of the two roads being immediately adjacent.

As found by the Commission in its report, the communities common to the traction company and the railroads at the eastern end of the line in the vicinity of Hillsboro are reasonably well served by those roads with respect to interstate shipments; and the same is true also of the places at the other end, from Stonelick westward, some of which are within a stone's throw of either the Norfolk & Western or the Baltimore & Ohio Southwestern. But at Boston, to the east of there, a town of some five hundred inhabitants, the distance is about five miles by the country roads to Batavia and something less than that to Baldwin, both of them stations on the line of the Norfolk & Western, and not less than eight miles to the nearest station on the Baltimore & Ohio Southwestern, while Dodsonville, a town of one hundred and fifty people, still further east towards Hillsboro, is also some four or five miles away from any station on the Baltimore & Ohio Southwestern and as much as eight miles from the nearest station on the Norfolk & Western. And between Boston on the west and Dodsonville on the east, a distance of about twenty miles, there are several villages, the largest of which is Fayetteville, with seven hundred inhabitants, which are from five to twelve miles distant from one or the other of the steam roads in question.

Conceiving that the first set of places described were sufficiently served in interstate commerce by the Norfolk & Western Railway or the Baltimore &

Ohio Southwestern Railroad, the Commission declined, so far as they were concerned, to make any order establishing through routes or joint rates between the steam roads and the traction company. But, on the other hand, this not being the case between Boston and Dodsonville, by reason of the distance from the steam roads, approximating not less than five miles in each instance, through routes and joint rates were established, and a switch connection given to make this effective. This connection was directed to be made, as to the Baltimore & Ohio Southwestern Railroad, at or near Hillsboro on the eastern end, and at Madeira, a few miles out of Norwood, on the western; and as to the Norfolk & Western at Hillsboro only, nothing being said as to any connection with it to the westward. The exact points where the connections should be made were not indicated, but the feasibility of connecting in each instance is asserted, in view of the fact that when the traction road was in process of construction, ten or more years ago, there was such a physical connection with the one road at Madeira on the western end and with both roads on the eastern end at a point spoken of as Hillsboro Junction. It is intimated that if the parties can not agree as to the specific place for making the connection in each case, a more definite order will be entered.

In considering whether upon this showing the Cincinnati & Columbus Traction Company is a lateral branch railroad, within the meaning of the law, it is to be observed that, according to the test applied by

the Commission, it is held to be such as to places and shippers along its line in the intermediate territory between Dodsonville and Boston, remote from and not sufficiently served by the trunk lines, but not as to those east or west of there, as the road approaches its termini, where this is not the case. But it is obvious that this is not and can not be the correct criterion. A road is or is not a lateral branch railroad, according to the relation which it bears to the line with which a switch connection is asked. And this relation is one of road to road, and not of shippers or territory. A road, in other words, does not have the character of a branch or lateral road as to some shippers and territory and not have it as to others. There is no such dividing up or limiting it, nor can it be of that shifting kind. Looking to the purpose of the law, a road is a lateral branch road when it is tributary to and dependent on another for an outlet; that is to say, where it is essentially a feeder, contributing traffic and capable of interchanging it therewith. It is not such where it is in effect an independent and competing line. Nor is this any less the case because it may not compete as to a portion of the territory involved. It is the general effect which decides, and that is not in doubt here. All three roads in the present instance have the same general east and west direction, and, so far as concerns Hillsboro on the east and Cincinnati or Norwood on the west, run between the same points. For half this distance also one or other of the steam roads draws its local traffic from and serves substantially

the same territory as the traction company. And so clearly are they, within the limits named, competing lines, that admittedly any attempt to consolidate the traction company with either of them would offend against the State if not the Federal law. Neither is it every carrier that is entitled to a switch connection with every other. As is said in the *Rahway Valley Railroad case* (216 U. S., 531), "The object was not to give a roving commission to every road that might see fit to make a descent upon a main line." It is the dependent or tributary character which gives rise to the right, and that is not determined by mere proximity or terminal approach, or the fact that the road seeking a connection has come to the end of its line. The contrast in the statute is with a private side track constructed to connect with an interstate carrier, with which a lateral branch road is thus associated and presumably intended to be compared. The point here is that the traction company's road, instead of being dependent or tributary, is in its own peculiar sphere, and, as to both the steam roads, an equal, independent, and competing line. Nor is this affected by the fact that as at present constructed it extends no further than Hillsboro or Norwood, and that upon the arrival at either of these places its carriage of persons or property is at an end. This is true even of a trunk line, when its terminus is reached, without thereby making out the necessary relation by which a switch connection with another road is able to be compelled. It may be that some shippers along the line of the traction company's road are not so fully

accommodated as they might be, as the case stands; and their needs are to be consulted to a certain extent without doubt. But this is not controlling, and their rights have necessarily to be worked out through the road for which in each instance a switch connection is sought, the character of which as a lateral branch line is only incidentally affected thereby. Without undertaking therefore to further define a "lateral branch line of railroad," we are clearly of opinion that the road of this traction company does not come within any reasonable meaning of the language used in the statute to describe the class of roads entitled to a switch connection. And if we are right in this view, the Commission was without jurisdiction to make the order in question.

A preliminary injunction was therefore properly ordered and the motion to dismiss will be overruled.

United States Commerce Court.

No. 65.—JUNE SESSION, 1912.

CHAMBER OF COMMERCE OF CITY OF AUGUSTA, GEORGIA, PETITIONER,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, RESPONDENTS.

ON MOTIONS TO DISMISS.

For opinion of the Interstate Commerce Commission, see 22 I. C. C., 223.

Mr. John B. Daish, with whom *Mr. E. G. Kalbfleisch* was on the brief, for the petitioner.

Mr. Winfred T. Denison, with whom *Mr. Thurlow M. Gordon* was on the brief, for the United States.

Mr. Chas. W. Needham for the Interstate Commerce Commission.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Judges.

[June 7, 1912.]

MACK, *Judge:*

Petitioner seeks the annulment of the action of the Interstate Commerce Commission in dismissing a complaint alleging that the rate of $2.10 per ton on

coal from Coal Creek mines in Tennessee to Augusta, Georgia, in force since October 1, 1907, was unjust and unreasonable in itself and subjected the manufacturers of Georgia to undue prejudice as compared with other designated points in the same general territory. In dismissing the complaint the Commission denied reparation.

That the Commission proceeded in all respects according to law in the hearing of the case, and that there was substantial evidence in support of its conclusions is not denied. The petitioner, however, alleges that the Commission erred in matters of law apparent on the face of the report in dismissing the complaint and in denying the relief prayed. On oral argument it was conceded that no one of the alleged errors of law would, of itself, be a sufficient basis to annul the order of the Commission, but it was urged that in some way this court could amalgamate all the charges of alleged error and deduce therefrom some sufficient new ground not specified which would require it to set aside the order of dismissal.

In view of the admissions of counsel, we deem it unnecessary to discuss the alleged errors in detail. In our judgment, neither any one of them nor all of them combined confer upon this court either the right or the duty to annul the Commission's order.

The motions of the respondents to dismiss the petition will therefore be sustained, and the petition will be dismissed at the petitioner's cost.

Petition dismissed.

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